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The Fair Housing Act and Religious Freedom

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Abstract

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The Fair Housing Act and Religious Freedom

By
Michael P. Seng*

[*1] Whenever a state or federal law touches upon the subject of religion there is the possibility of conflict with the First Amendment. The First Amendment to the United States Constitution prohibits the government from establishing religion and from interfering with the free exercise of religion.¹ Both the Fair Housing Act and the 1996 Welfare Reform Act raise delicate issues relating to the establishment and free exercise of religion in the private and public housing markets.

The Fair Housing Act,² passed by Congress after the assassination of Martin Luther King, Jr. in 1968, and amended by the Fair Housing Amendments Act of 1988, prohibits housing discrimination on the basis of religion.³ The Act makes it illegal for a housing provider, public or private, to discriminate in the sale or rental of housing or in the provision of housing services on the basis of religion.⁴ The Act contains a very limited exemption for religious organizations.⁵

The Welfare Reform Act of 1996 contains a charitable choice provision that authorizes federal and state governments to provide religious organizations with direct monetary grants for social services on the same basis as any other private organization.⁶ The Charitable Choice provision of the 1996 Welfare Reform Act, which was introduced in Congress by Senator John Ashcroft and signed into [*2] law by President William Clinton, began what under the George W. Bush Administration became known as the “Faith-Based Initiatives” program.⁷ This program allows religious organizations to participate in government subsidy programs on an equal basis with secular organizations. The Act does not specifically define a religious organization; instead, it provides that a religious organization retains “its independence from Federal, State, or local governments, including such organization’s control over the definition, development, practice, and expression of its religious beliefs.”⁸ It further

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¹ U.S. Const. amend. I.

² 42 U.S.C. 3601 et seq. (2000) (It also prohibits discrimination on the basis or race, color, national origin, sex, handicap, and familial status. State and local laws and ordinances sometimes expand these protected classifications.)

³ 42 U.S.C. 3604.

⁴ *Id.*

⁵ 42 U.S.C. 3607(a).

⁶ 42 U.S.C. 604a(c).

⁷ 42 U.S.C. 604a (2000).

⁸ 42 U.S.C. 604a(d)(1).

provides that, “neither the Federal Government nor a State shall require a religious organization to - (A) alter its form of internal governance; or (B) remove religious art, icons, scripture, or other symbols... .”⁹ Under the Act, a religious organization may not refuse to serve persons on the basis of their religion or their refusal to participate in religious practice.¹⁰

The Federal Fair Housing Act’s broad prohibition on religious discrimination in the sale or rental of a dwelling, or in the provision of housing services applies to housing that is faith-based.¹¹ For [*3] example, the Act’s prohibition on the publication of any notices, statements, or advertisements with respect to the sale or rental of a dwelling that indicates a preference, limitation, or discrimination based on religion¹² undoubtedly affects the way many faith-based projects can be promoted to the public.

On the other hand, the Fair Housing Act exempts dwellings owned or operated by religious organizations from some of the prohibitions in the Act.¹³

⁹ 42 U.S.C. 604a(d)(2).

¹⁰ 42 U.S.C. 604a(g).

¹¹ See generally 42 U.S.C. 3604-3606 (2000). A dwelling is defined as “any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof.” *United States v. Hughes Memorial Home*, 396 F.Supp. 544, 548-49 (W.D. Va. 1975). The definition includes congregates as well as individual dwellings. The Act clearly applies to senior housing, assisted housing, and nursing homes, as dwellings for many seniors or persons with disabilities. *Hovsons, Inc. v. Township of Brick*, 89 F.3d 1096, 1102 (3d Cir. 1996).

Providing safe and affordable housing for seniors is a matter of growing public policy concern, and while there are presently only a few cases that involve discrimination in senior housing, more claims will inevitably arise. The *New York Times* has reported that most seniors prefer to live in homes where they can be with persons of similar backgrounds and interests and that housing providers are building communities to meet these needs. Hilary Apelman, *All Your Neighbors Are Just Like You*, *N.Y. Times*, April 13, 2004, at E1. This is understandable, but it also presents greater opportunities for providers of senior housing to discriminate in violation of the Federal Fair Housing Act.

The Fair Housing Act clearly prohibits discrimination in senior housing on the basis of race, color, religion, sex, handicap, familial status or national origin in senior housing. 42 U.S.C. 3604. The exemption in the Fair Housing Act for “housing for older persons,” only allows these projects to exclude children under 18 years of age, which otherwise would be forbidden under the familial status provisions of the Act. 42 U.S.C. 3607(b)(1). Senior housing is not exempt from any of the other anti-discrimination provisions of the Act.

Many senior projects are faith-based, and therefore, questions can arise about the role of religion in these facilities. Many seniors find great solace in religion, and religion often takes a prominent role in their lives. Consequently, the right of elderly persons to the free exercise of religion is important, especially when they are disabled or otherwise in need of assistance, so that they can fulfill their religious obligations.

However, the First Amendment forbids the government from promoting religion. Whenever the government provides assistance to faith-based senior housing projects there is a concern that the government should not go too far and breach the wall of separation between church and state.

¹² 42 U.S.C. 3604(c).

¹³ See 42 U.S.C. 3607(a). This section allows “a religious organization, association, or society, or any nonprofit institution or organization operated, supervised or controlled by or in conjunction

Thus, the Act attempts to walk the delicate boundary between not favoring religion and not disadvantaging religion.

Early in his presidency, George W. Bush attempted to expand the application of the Charitable Choice provisions of the Act.¹⁴ Although he was unsuccessful with Congress, President Bush published a series of executive orders that expanded Faith-Based Initiatives.¹⁵ Traditionally government funding had been available to groups, such as Catholic Charities, that operated as independent Section 501(c)(3) organizations.¹⁶ The Charitable Choice provisions of the Act and the Bush executive orders generally make government funds more available to faith-based religious organizations,¹⁷ and consequently they raise important concerns under the Establishment Clause of the First Amendment.

The 1996 Act did not apply directly to federal housing programs, and an attempt to extend the Charitable Choice provisions to housing assistance was defeated in 2001.¹⁸ However, in 2004 the Federal Department of Housing and Urban Development (HUD) adopted regulations to implement the President's Faith-Based Initiatives in all HUD programs.¹⁹ The regulations make possible equal participation of religious organizations in HUD programs and activities by prohibiting discrimination against an organization on the basis of the organization's religious character or [*4] affiliation.²⁰ The regulations prohibit the organization from engaging in "inherently religious activities" when participating in any activities funded by HUD.²¹ "Inherently religious activities" include worship, religious instruction, or proselytism.²² This prohibition is tempered by the qualification that these "inherently religious activities" may be offered separately, "in time or location," from the programs, activities, or services supported by HUD funds, and participation in these activities must be voluntary for the beneficiaries of the program.²³

HUD regulations, like all administrative actions, must comply with federal legislative and constitutional mandates; thus, the HUD regulations regarding

with a religious organization, association, or society" to limit "the sale, rental or occupancy of dwellings which it owns or operates for other than a commercial purpose to persons of the same religion" and allows such an organization to give "preference to such persons, unless membership in such religion is restricted on account of race, color, or national origin."

¹⁴ See, Community Solutions Act, H.R. 7, 107th Cong. 201(c)(4) (2001).

¹⁵ See e.g., Exec. Order No. 13,198, 66 Fed. Reg. 8497 (Jan. 29, 2001); Exec. Order 13,199, 66 Fed. Reg. 8499 (Jan. 29, 2001); and Exec. Order 13,279, 67 Fed. Reg. 77,141 (Dec. 12, 2002).

¹⁶ David M. Ackerman, *Public Aid to Faith-Based Organizations (Charitable Choice) in the 107th Congress: Background and Selected Legal Issues*, Congressional Research Service Report for Congress, order code RL31043, at 7 (Aug. 19, 2003).

¹⁷ See generally, www.whitehouse.gov/government/fbci/guidance/charitable.html.

¹⁸ H.R. 7.

¹⁹ See Equal Participation of Faith-Based Organizations, 69 Fed. Register 41,712 (July 9, 2004) (codified at 24 C.F.R. 5.109).

²⁰ *Id.*

²¹ 24 C.F.R. 5.109(c).

²² *Id.*

²³ *Id.*

Faith-Based Initiatives specifically provide that an organization's participation in HUD programs and activities must comply with applicable federal fair housing and nondiscrimination requirements.²⁴ Furthermore, in administering HUD programs, the Secretary (as well as all other executive departments and agencies) has a Congressional mandate under the Fair Housing Act "affirmatively to further" fair housing.²⁵

As drafted, neither the Fair Housing Act nor the Faith-Based Initiatives Program appears to violate the First Amendment. However, both statutes require careful application so as not to disrupt the careful balance required by the First Amendment.

I. The Fair Housing Act

A. Religion as a Protected Class

Religion is a protected class under the Fair Housing Act, and housing providers are prohibited from discriminating on the basis of religion with regard to any housing units covered by the Act.²⁶

Remarkably, the United States Supreme Court has stated that it does not believe there has been a recent history of pervasive religious discrimination proven by the States.²⁷ Regardless of the [*5] validity of this assertion, there is no

²⁴ *Supra* note 21 at 41,713.

²⁵ 42 U.S.C. 3608(e) (2000). The Eight Circuit Court of Appeals has held that the duty "affirmatively to further" fair housing means that the HUD Secretary, when administering programs, has "an obligation to assess negatively those aspects of a proposed course of action that would further limit the supply of genuinely open housing and to assess positively those aspects of a proposed course of action that would increase that supply." *Darst-Webbe Tenant Assoc. v. St. Louis Housing Authority*, 339 F.3d 702, 713 (8th Cir. 2003). *See also* *Dean v. Martinez*, 336 F.Supp.2d 477 (D. Md. 2004).

²⁶ 42 U.S.C. 3604.

²⁷ *See City of Boerne v. Flores*, 521 U.S. 507, 530-32 (1997) (held that the Religious Freedom Restoration Act was unconstitutional as applied to the states under section 5 of the Fourteenth Amendment, finding that Congress did not have sufficient evidence of recent instances of state discrimination on the basis of religious practice). It is doubtful that this reasoning would prevail in an attack against the Fair Housing Act, which is grounded on both section 5 and the Commerce Clause and applies to private action as well as public action.

No challenges based on *Boerne* have been made to the prohibition of religious discrimination under the Fair Housing Act. However, in *Groome Resources Ltd. v. Parish of Jefferson*, 234 F.3d 192, 205-16 (5th Cir. 2000), the Court of Appeals held that Congress had the power to eliminate handicap discrimination under the Fair Housing Act, and in *Seniors Civil Liberties Ass'n v. Kemp*, 965 F.2d 1030, 1034 (11th Cir. 1992), the Court of Appeals held that Congress had the power to eliminate familial status discrimination. Both cases found that housing discrimination, on the basis of familial status and handicap, has a substantial effect on commerce. *Groome Resources Ltd.*, 234 F.3d at 207-08; *Seniors Civil Liberties Ass'n*, 965 F.2d at 1034. The same reasoning could be applied to religious discrimination as well.

The legislative history of the 1968 Fair Housing Act is not helpful in construing the provisions prohibiting religious discrimination. *See* Jean Eberhart Dubofsky, *Fair Housing: A Legislative*

question that there is a long history of religious discrimination in the private housing market. The most notable example was the prevalence of restrictive covenants in certain residential areas against Jewish people.²⁸ Though prevalent, religious discrimination has not generated a large number of cases under the Fair Housing Act.²⁹ However, such cases may arise in the future. The terrorist attacks of September 11, 2001, and the resulting “War on Terrorism” have focused attention on Arab-Americans and Muslims and could realistically result in increased housing discrimination against these persons because of their religion.

Because religious affiliation is a protected class, requiring a religious test to occupy a housing unit would violate the Fair Housing Act. Unless the dwelling is exempt from the Act, a religious organization cannot treat members of its faith preferentially,³⁰ just as a white housing provider cannot favor a white applicant, or a Chinese American cannot favor another Chinese American. The Act [*6] may also be violated if there is discrimination in the terms or conditions of occupancy or in the provision of services or facilities.³¹ Inquiring about someone’s religion under circumstances where it appears that religion may be relevant to the occupancy of the unit or the nature of the services available may similarly violate the Act.³²

In *LeBlanc-Sternberg v. Fletcher*,³³ a municipal zoning ordinance forbade private homes from being used to conduct religious services. Orthodox Jews claimed that the law discriminated against them and that the law was enacted, at

History and a Perspective, 8 Washburn L.J. 149 (1969); Schwemm Housing Discrimination: Law and Litigation (Updated 2004), 5:2 - 5:4. The religious provisions were not further addressed in the 1988 Amendments Act, which added the protected classes of handicap and familial status. See Michael P. Seng, *Discrimination Against Families With Children and Handicapped Persons Under the 1988 Amendments to the Fair Housing Act*, 22 John Marshall L. Rev. 541 (1989).

²⁸ See, *TO SECURE THESE RIGHTS - THE REPORT OF THE PRESIDENT’S COMMITTEE ON CIVIL RIGHTS*, 68-69 (1947). Judicial enforcement of these covenants that discriminate in violation of the 14th Amendment was prohibited by the United States Supreme Court in *Shelley v. Kraemer*, 334 U.S. 1 (1948).

²⁹ Part of this may be because discrimination against Jews and Muslims and other religious groups is often characterized as “racial” or “national origin” discrimination under the civil rights laws. See *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987) (discrimination against Jews is a form of racial discrimination under the Civil Rights Act of 1866); *Saint Francis College v. Al-Khazraji*, 481 U.S. 604 (1987) (discrimination against Arabs is a form of racial discrimination under the Civil Rights Act of 1866). However, religious discrimination as such will not violate the Civil Rights Act of 1866. In *Bachman v. St. Monica’s Congregation*, 902 F.2d 1259, 1261-62 (7th Cir. 1990), the Court of Appeals held that discrimination against non-Catholics was not, in and of itself, discrimination on the basis of race even though a Jewish couple was denied the housing.

³⁰ See generally 42 U.S.C. 3604.

³¹ *Id.* at § 3604 (b).

³² *But see* *Knutzen v. Eben Ezer Lutheran Hous. Center*, 617 F. Supp. 977, 984 (D. Colo. 1985), *aff’d*, 815 F.2d 1343 (10th Cir. 1987), which held that inquiries about religious affiliation were simply to allow the housing provider to notify the tenant’s clergyman in case of an emergency and not for purposes of discriminating in the admissions process. However, a landlord is obviously on slippery ground when asking such questions.

³³ 67 F.3d 412 (2d Cir. 1995).

least in part, to keep them out of the village.³⁴ On appeal, the Court held that the evidence and the law supported a jury verdict against the village.³⁵ This case supports the argument that a rule that discriminates on the basis of religion because it purposefully singles out religion for special treatment is illegal.³⁶ *LeBlanc-Sternberg* also supports an argument that facially neutral rules that have a disparate impact upon those who want to practice their religion would be illegal under the Fair Housing Act unless the housing provider could justify it with some religiously neutral reason, regardless of whether a reasonable accommodation³⁷ for religious practices is required.³⁸

[*7] A rule that required housing residents to attend religious services appears to directly affect the terms and conditions of occupancy in violation of section 3604(b). While there are no reported cases on point, sometimes such rules of dubious legality have been imposed by providers of homeless shelters.³⁹ The new HUD regulations concerning faith-based organizations forbid recipients of federal moneys from requiring residents to participate in these programs.⁴⁰

If a housing provider serves meals, must the provider accommodate the special dietary needs imposed by a particular resident's religious practices? It can be argued that this is a service that is provided to residents as part of the housing and that the effect of the non-accommodation is to send a message that persons of

³⁴ *Id.* at 416.

³⁵ *Id.* The *Leblanc* decision raises a number of questions. For instance, the Court of Appeals mentions that religious discrimination can be established either by showing a discriminatory intent or a discriminatory impact. *See generally*, Fletcher, 67 F.3d at 426. Under the facts of the case, there was probably more than enough evidence for the jury to find a discriminatory intent. A finding that an ordinance is illegal on an intent theory is obviously much easier to sustain on an appeal than a finding that it is illegal under an impact theory. *See Simms v. First Gibraltar Bank*, 83 F.3d 1546, 1555 (5th Cir. 1996) (impact must be established by a policy or practice and not by a mere incidence of discrimination). Also, the Village had previously allowed home worship and then passed an ordinance against it. How much that sequence of events may have influenced the jury is not disclosed.

³⁶ *Id.* *See also* *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534-40 (1993) (holding that an ordinance that prohibited animal sacrifices was not neutral because it prohibited only slaughtering for the purpose of religious practices).

³⁷ *See* discussion of reasonable accommodations *infra* Part I D.

³⁸ Although the Supreme Court has not decided the issue, lower courts have held that policies or practices that have a disparate impact against a protected class may violate the Fair Housing Act. *See, e.g.*, *United States v. City of Black Jack*, 508 F.2d 1179, 1185 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975); *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1288 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978); *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 934 (2d Cir. 1988), *aff'd per curiam*, 488 U.S. 15 (1988). While continuing to adhere to the disparate impact standard, the Court of Appeals for the Seventh Circuit has questioned whether the standard is appropriate in a racial steering case, *Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1529 (7th Cir. 1990), and, without deciding the question, in insurance redlining cases. *NAACP v. American Family Mutual Insurance Co.*, 978 F.2d 287, 291 (7th Cir. 1992), *cert. denied*, 508 U.S. 907 (1993).

³⁹ *See, e.g.*, *Woods v. Foster*, 884 F. Supp. 1169, 1173 (N.D. Ill. 1995) (homeless shelter for battered women who are looking for permanent housing is a dwelling).

⁴⁰ *See*, 24 C.F.R. 5.109(c).

different religions are not welcome. The housing provider would argue that it treats everyone the same and has no independent responsibility to accommodate the needs of each resident by serving meals.⁴¹ Nonetheless, by volunteering to serve meals, the housing provider offers a service that is covered under the Fair Housing Act.⁴²

Questions can arise about the right of residents to display religious symbols. Obviously a rule that specifically prohibited the display of religious pictures or icons would discriminate on the basis of religion and violate the Fair Housing Act.⁴³ However, a rule of general applicability that was passed in response to specific complaints about the display of religious symbols or under circumstances where the only symbols displayed were religious, should also be found to discriminate on the basis of religion. For example, if a condominium association pass a rule prohibiting the display of signs or symbols of any kind and a resident desires to display a mezuzah, which is required by Jewish custom, the rule [*8] should be illegal under the reasoning of LeBlanc-Sternberg if there is no independent religiously neutral reason that would justify the rule.

Additionally, religion is a protected classification for a person that is “institutionalized” in state housing, such as a senior who resides in a nursing home or care center, under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA).⁴⁴ RLUIPA adopts the definition of “institution” used in the Civil Rights of Institutionalized Persons Act.⁴⁵ The Civil Rights of Institutionalized Persons Act⁴⁶ defines the term “institution” to mean:

“any facility or institution - (A) which is owned, operated, or managed by, or provides services on behalf of any State or political subdivision of a State; and (B) which is - (i) for persons who are mentally ill, disabled, or retarded, or chronically ill or handicapped

⁴¹ In *HUD v. Hous. Auth. of the City of Reno*, 2A Fair Hous.-Fair Lending (Aspen) 26,286 (H.U.D. A.L.J. June 19, 2002), a HUD Administrative Law Judge held that a housing authority was not required to accommodate a disabled tenant by considering his purchase of restaurant meals as a medical expense in calculating his rental contribution. The tenant argued that it was dangerous for him to cook and therefore he had to eat all his meals outside the unit. *Id.* at 26,287-88. This case involved a request to pay for meals outside the housing complex and does not involve a housing provider that offers meals as part of the housing “package.” *Id.* at 26,288-89. The judge found that a reasonable accommodation was not necessary to afford him an equal opportunity to use and enjoy his apartment. *Id.* at 26,291-93.

⁴² 42 U.S.C. 3604(b).

⁴³ *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534-40 (1993) (the Court invalidated a city ordinance that specifically targeted a religious practice under the First Amendment. The Fair Housing Act would similarly invalidate a private housing rule that was neither “neutral” nor “of general applicability”).

⁴⁴ 42 U.S.C. 2000cc-1 (2000). The United States Supreme Court has sustained the constitutionality of the Act over the objection that it is an impermissible accommodation that violates the First Amendment. *Cutter v. Wilkinson*, 125 S.Ct. 2113, 2128 (2005).

⁴⁵ 42 U.S.C. 2000cc-1(a).

⁴⁶ 42 U.S.C. 1997 (2000).

... or (v) providing skilled nursing, intermediate or long-term care, or custodial or residential care.”⁴⁷

Whether residents of a state-run nursing home or care facility are considered “institutionalized” under the RLUIPA, so that they can seek the higher level of protection, will largely depend upon whether the facts satisfy the definition.

B. Advertising and Section 3604(c)

Section 3604(c) makes it unlawful:
to make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, [*9] handicap, familial status, or national origin or an intention to make such preference, limitation or discrimination.”⁴⁸

HUD has adopted a nuanced approach to the application of this section.

Many faith-based housing complexes are religiously owned or sponsored and convey that sponsorship in their names: The Lutheran Home for the Aged, the Masonic Home, or Saint Anne’s Hospice. Many people might assume that the names of these homes, even though the homes may be open to all, nominally indicate a preference for persons of that faith or creed. HUD’s new Faith-Based Initiatives directive specifically provides that religiously affiliated organizations that receive federal funding may retain religious terms in their organization’s name and in their mission statements and other governing documents.⁴⁹

However, under the Fair Housing Act, advertising should not contain an explicit preference, limitation, or discrimination because of religion.⁵⁰ For example, a real estate company’s excessive use of Christian images and slogans in

⁴⁷ 42 U.S.C.1997(1). “Privately owned and operated facilities are not deemed ‘institutions’ if – “(A) the licensing of such facility by the State constitutes the sole nexus between such facility and such State; (B) the receipt by such facility, on behalf of persons residing in such facility, of payments under title XVI, XVIII, or under a State plan approved under title XIX, of the Social Security Act [42 U.S.C.A. 1381 et seq., 1395 et seq., or 1396 et seq.], constitutes the sole nexus between such facility and such State; or (C) the licensing of such facility by the State, and the receipt by such facility, on behalf of persons residing in such facility, of payments under title XVI, XVIII, or under a state plan approved under title XIX, of the Social Security Act [42 U.S.C.A. 1381 et seq., 1395 et seq., or 1396 et seq.], constitutes the sole nexus between such facility and such State.” 42 U.S.C. 1997(2).

⁴⁸ 42 U.S.C. 3604(c).

⁴⁹ 5 C.F.R. 5.109(d).

⁵⁰ *Supra* note 42.

its real estate advertising may convey a message of exclusion.⁵¹ HUD has advised that advertising containing a religious reference or symbol will not automatically violate 3604(c), if it is accompanied by a disclaimer that the home is open to all without discrimination.⁵² Also, advertisements that state that the complex contains a chapel or that kosher meals are available do not on their face discriminate or violate the Act.⁵³ Regardless of whether these distinctions made by HUD make sense in light of the overall policies of the Fair Housing Act, there can be no doubt that they reflect current practices in the market place; and it is unlikely that a court would find that HUD was acting unreasonably in refusing to find that such practices violate the Fair Housing Act.

The display of religious symbols by faith-based organizations may present special problems under the Fair Housing Act. The new HUD faith-based initiatives directive specifically states that religious organizations need not remove religious art, icons, scriptures or other religious symbols from spaces where services are provided using HUD funding.⁵⁴ Having a crucifix or a Star of David in the lobby or a picture of the Last Supper in the dining room would not [*10] seem in and of itself to send an exclusionary message. However, whether such symbols violate the Fair Housing Act will depend upon the total context of the display and the effect that the display would have on the average person.⁵⁵ If the symbols are pervasive and would make a reasonable person of a different religion feel unwanted or uncomfortable, they may act as a deterrent to persons who are not of the same faith and could, in these circumstances, violate the Fair Housing Act.

C. The Exemptions

The Fair Housing Act attempts to accommodate religious bodies by giving them a limited exemption. Section 3607(a) states:

“Nothing in this title shall prohibit a religious organization, association, or society, or any nonprofit institution or organization operated, supervised or controlled by or in conjunction with a religious organization, association, or society, from limiting the sale, rental or occupancy of dwellings which it owns or operates for other than a commercial purpose to persons of the same

⁵¹ See, *Lotz Realty Co. v. U.S. Dept. of Justice*, 717 F.2d 929, 930 (4th Cir. 1983).

⁵² See, *Achtenberg*, FHEO Guidance Regarding Advertisements under Section 804(c) of the Fair Housing Act, 1 Fair Hous.-Fair Lending (Aspen) 5365, 5366 (Fair Hous. and Equal Opportunity Jan. 9, 1995).

⁵³ *Id.*

⁵⁴ 5 C.F.R. 5.109(d).

⁵⁵ See *Ragin v. The New York Times Co.*, 923 F.2d 995, 1000 (2d Cir. 1991) (human model advertisements that would convey a preference to the ordinary observer violate the Fair Housing Act).

religion, or from giving preference to such persons, unless membership in such religion is restricted on account of race, color, or national origin.”⁵⁶

There are very few reported cases where this exemption has been raised. As with any exception to a general regulatory scheme, Congress intended that the exemption be read narrowly in light of the overreaching purpose of the Act to prohibit discrimination against protected classes.⁵⁷ The language of the exemption is also narrow. It applies to the “sale, rental, or occupancy of dwellings” or giving “preference” to persons of the same religion. By its terms, it does not cover other practices prohibited by the Fair Housing Act.

Section 3607(a) does not apply to properties owned and operated by religious organizations, associations or societies for commercial purposes.⁵⁸ This limitation on the exemption makes it inapplicable to many religiously owned or operated properties because most housing owned or operated by religious organizations will be operated for a commercial purpose. The Act does not define what a commercial purpose is. Clearly a church can restrict who [*11] occupies a rectory or manse or allow only nuns or monks to reside in a convent or monastery. However, once a religious organization decides to sell or rent homes to lay persons, it must not restrict the sales or leases only to members of the religion of the organization.

The religious exemption will not apply if there is discrimination on the basis of race, color, or national origin.⁵⁹ This limitation is in accordance with the government’s compelling interest in eliminating discrimination.⁶⁰ In *United States v. Hughes Memorial Home*,⁶¹ a private home for children was held not to be exempt under the Act because it discriminated on the basis of race, and not religion. The exemption does not explicitly refer to discrimination on the basis of sex, handicap, or familial status.⁶² Therefore, a question could be raised whether religious organizations can discriminate on a basis other than race, color, or national origin. However, section 3607(a) only exempts religious organizations’ preferential treatment of members of their religion. It does not exempt religious organizations that discriminate on a basis other than religion. Because the Fair Housing Act prohibits discrimination based on sex, handicap, or familial status generally,⁶³ because exemptions are to be narrowly construed,⁶⁴ and because

⁵⁶ 42 U.S.C. 3607(a).

⁵⁷ *United States v. Columbus Country Club*, 915 F.2d 877, 882 (3d Cir. 1990). The legislative history is not helpful in interpreting the religious exemption to the Fair Housing Act.

⁵⁸ 42 U.S.C. 3607(a).

⁵⁹ *Id.*

⁶⁰ *See* *Bob Jones University v. United States*, 461 U.S. 574, 603-04 (1983) (race); *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (gender).

⁶¹ 396 F.Supp. 544 (W.D. Va. 1975).

⁶² *Id.*

⁶³ 42 U.S.C. 3604.

⁶⁴ *Supra* note 61 at 882.

Congress has not articulated a sound policy reason that would allow religious organizations to discriminate on the basis of sex, handicap or familial status, this type of discrimination by religious organizations should be illegal under the Act.

The leading case addressing the question of what constitutes a “religious organization” under section 3607(a) is *United States v. Columbus Country Club*.⁶⁵ The Knights of Columbus, a Roman Catholic organization, formed the Columbus Country Club as a not-for-profit organization in 1920, but no longer had any legal relationship with it.⁶⁶ The Club maintained summer homes on a 23-acre tract on the Delaware River.⁶⁷ Members of the Club were required to be Roman Catholics and to be recommended by their parish priest.⁶⁸ Although the Club had no formal affiliation with the [*12] Roman Catholic Church, weekly celebration of the mass was conducted on the Club property and some members of the Club gathered at the Chapel every evening to say the rosary.⁶⁹ A statue of the Virgin Mary was located near the entrance to the Club.⁷⁰

The District Court found and the parties agreed that the Club itself was not a “religious organization,”⁷¹ but the Club maintained that it was “operated, supervised or controlled by or in conjunction with” a religious organization.⁷² The Court of Appeals held that the Church’s grant of the privilege of having weekly mass on the Club grounds and its tacit approval of the recital of the rosary was not sufficient to show that it was operated in conjunction with a religious organization.⁷³ The appellate court defined “operated in conjunction with” to require:

[A] mutual relationship between the non-profit society and a religious organization. The existence of this relationship cannot depend solely on the activities of the non-profit organization nor be viewed only from its perspective. Indeed, evidence of the club’s unilateral activities would go to whether it is itself a religious organization not to whether it is operated “in conjunction with” a religious organization. Furthermore, the Church’s ability to withdraw permission to hold mass and the fact that on one occasion it may have indirectly influenced the club’s Board of Governors by threatening to do so are not enough. Without further evidence of interaction or involvement by the Church, we cannot conclude that as a matter of law, the Church controlled the

⁶⁵ 915 F.2d 877 (3d Cir. 1990). See Claudia J. Reed, Note, *Housing Law - United States v. Columbus Country Club: How “Religious” Does an Organization Have to Be to Qualify for the Fair Housing Act’s Religious Organization Exemption?*, 15 W. New Eng. L. Rev. 61, 86 (1993).

⁶⁶ *Id.* at 878-79.

⁶⁷ *Id.* at 879.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 882.

⁷² *Id.*

⁷³ *Id.* at 883.

defendant or that the defendant was operated “in conjunction with” the Church. Consequently, on this record and in light of our unwillingness to read the statutory exemption broadly, we hold that the defendant failed to carry its burden of proving its entitlement of the religious organization exemption.⁷⁴

The Court of Appeals used a parochial school as an example of what might be considered an affiliated organization⁷⁵, citing [*13] comments of Senator Walter Mondale, the Fair Housing Act’s chief sponsor:

⁷⁴ *Id.*

⁷⁵ *Id.* at 882. The exemption for religious organizations under Title VII is somewhat narrower than the exemption under the Fair Housing Act. 42 U.S.C. 2000e-1(a) (2002) provides that: “This subsection shall not apply ... to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.”

Many of the cases interpreting section 2000e-1 involve schools. In *Killinger v. Samford University*, 113 F.3d 196, 199 (11th Cir. 1997), a university was allowed to claim the exemption because it was controlled in substantial part by and received over \$ 4 million annually from the state Baptist Convention. This amount was 7% of the University’s budget and was the largest single source of its funding. Similarly, in *Hall v. Baptist Health Care Corp.*, 215 F.3d 618, 624-25 (6th Cir. 2000), a nursing school was found to be covered by the exemption because it was founded by a sectarian organization, had a religious mission, and was closely associated with the Arkansas, Mississippi, and Tennessee Baptist Conventions and their affiliated churches. In *EEOC v. Kamehameha Schools*, 990 F.2d 458, 461 n.7 (9th Cir. 1993), the Court found that a school was not exempt on the basis of religion because the school was primarily secular. The Court observed:

“The Schools maintain a cooperative relationship with the Bishop Memorial Church, which receives financial support from the Bishop Estate and is a member of the Hawaii Conference of the United Church of Christ. However the Schools themselves are not affiliated with the Church of Christ, and the parties stipulated that no Protestant denomination, including the Church of Christ, ‘owns, supports, controls or manages, in whole or in part, the Bishop Estate or the Kamehameha Schools.’

“In view of the narrow reach of the section 2000e-1 exemption, it is not surprising that we have found no case holding the exemption to be applicable where the institution was not wholly or partially owned by a church... .”

In *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 330 (1987), where the Supreme Court held that the exemption did not violate the Establishment Clause of the First Amendment, the school in question was a nonprofit facility, open to the public, run by the Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints and the Corporation of the President of the Church of Jesus Christ of Latter-day Saints, both of which were religious entities associated with the Church, an unincorporated religious association.

The Courts have been somewhat more relaxed in applying the National Labor Relations Act. In *NLRB v. Bishop Ford Central Catholic High School*, 623 F.2d 818, 823 (2d Cir. 1980), the Court held that a religious mission was sufficient to justify preference of co-religionists even though the school was no longer affiliated with a religious organization.

There is an exemption to permit religious institutions *or schools, etc., affiliated with them*, to give preference in housing to persons of their own religion despite the Act.’ 114 Cong. Rec. 2273 (Feb. 6, 1968) (emphasis added).⁷⁶

A dissenting opinion by Judge Mansmann argued that the majority had unduly minimized the significant connections between the Columbus Country Club and the Catholic Church.⁷⁷ He argued that a formal relationship was not required under a literal reading of the statutory language.⁷⁸ He saw the religious dimension of the Club as substantial and not as mere subterfuge to evade the requirements [*14] of the Fair Housing Act.⁷⁹ He feared that subjecting the Club to the Fair Housing Act would “destroy its character as a religious community where like-minded individuals are able to support one another, communally express their beliefs and model their values to their children.”⁸⁰ Undoubtedly, the majority in Columbus Country Club read section 3607(a) very narrowly, but in light of the fact that the purpose of the Act is to eliminate religious discrimination, the Court’s decision would appear to be correct.

*United States v. Lorantffy Care Center*⁸¹ presented a more difficult question concerning the definition of a “religious organization” however, the Court found it unnecessary to provide an answer. The case concerned a church-established care center for elderly immigrants from Hungary.⁸² The care facility was found to have violated the Fair Housing Act because it discriminated on the basis of race and national origin and, therefore, could not claim the exemption under the Fair Housing Act.⁸³ Even if there had been no record of racial discrimination, it is doubtful that the Lorantffy Care Center would have qualified as a religious organization. A minister with the support of his church’s council and congregation established the Center as an independent legal entity.⁸⁴ The Church’s members gave money to the Center, and the Church and the Center shared facilities and personnel.⁸⁵ Church members were given priority to the facility, and there was an agreement that if the Center were to cease operations, all its assets were to go to the Church.⁸⁶ Nonetheless, residents paid for their housing

⁷⁶ Columbus Country Club, 915 F.2d at 882.

⁷⁷ *Id.* at 885.

⁷⁸ *Id.*

⁷⁹ *Id.* at 888.

⁸⁰ *Id.* However, the defendants were unable to make a persuasive argument on remand that opening the housing to outsiders adversely affected the practice of their religion in any way. *See United States v. Columbus Country Club*, No. 87-8164, 1992 U.S. Dist. LEXIS 16438 (E.D. Pa. Oct. 22, 1992).

⁸¹ 999 F. Supp. 1037 (N.D. Ohio 1998).

⁸² *Id.* at 1040.

⁸³ *Id.* at 1044.

⁸⁴ *Id.* at 1040.

⁸⁵ *Id.*

⁸⁶ *Id.* at 1040-41.

as they would in any commercial venture, and it was not readily apparent that removing the discriminatory requirements that gave preference to Church members would negatively impact anyone's practice of religion.⁸⁷

Similarly, in *Bachman v. St. Monica's Congregation*,⁸⁸ a suit was filed for racial discrimination under the 1866 Civil Rights Act. The Church sold the house to a Catholic couple not from the [*15] parish.⁸⁹ A Jewish couple unsuccessfully claimed discrimination on the basis of race.⁹⁰ The Court stated that it was an open question whether, had the case been filed for religious discrimination under the Fair Housing Act, the property would have been entitled to the 3607(a) exemption.⁹¹ However, given the commercial nature of the transaction and the fact that it was an outright sale, one would not have expected the defendants to prevail had they raised this issue.

Based on these precedents, it appears that most housing operated by religious organizations will not be able to claim the religious exemption in 3607(a). The housing itself will not be a "religious organization." And because usually the housing will have only loose ties to a church, it will not be able to show that it is operated "in conjunction" with a religious organization.

D. No Duty to Provide a Reasonable Accommodation for Religion

The Fair Housing Act requires housing providers to make reasonable accommodations for persons with disabilities.⁹² No similar requirement exists for persons with religious needs.⁹³ Thus, a faith-based complex that serves meals but does not meet the religious requirements of a tenant, or institutes a neutral rule that prohibits the consumption of alcohol on the premises and is interpreted to preclude the use of wine at a Catholic mass on the premises, would not have to yield to accommodate the religious beliefs or practices of tenants, unless there is

⁸⁷ See generally, *Id.* at 1041.

⁸⁸ 902 F.2d 1259 (7th Cir. 1990).

⁸⁹ *Id.* at 1260.

⁹⁰ *Id.*

⁹¹ *Id.* at 1261.

⁹² 42 U.S.C. 3604(f)(3).

⁹³ In this respect, the Fair Housing Act differs from Title VII, which was amended in 1972 to provide:

"The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."
42 U.S.C. 2000e(j) (2000).

In *EEOC v. Townley Eng'g and Mfg. Co.*, 859 F.2d 610, 618 (9th Cir. 1988), the Court of Appeals held that an employer must excuse employees from devotional services held once a week during work hours under 42 U.S.C. 2000e(j).

independent proof of discrimination on the basis of religion in the provision of these services.⁹⁴

[*16] Nonetheless, if the request for a reasonable accommodation were related to the special needs of disabled persons⁹⁵ in the complex, a discrimination claim should be successful if the accommodation does not pose an undue cost or

⁹⁴ See *Hack v. President and Fellows of Yale College*, 16 F. Supp. 2d 183 (D. Conn. 1998), *aff'd*, 237 F.3d 81 (2d Cir. 2000) (college had no duty under the Fair Housing Act to accommodate the religious beliefs of students who objected to living in co-educational dorms). In his partial dissent in the Court of Appeals, Judge Moran distinguished the Fair Housing Act from Title VII which requires employers to accommodate the religious practices of their employees and the 1988 Amendments to the Fair Housing Act that requires housing providers to accommodate the needs of persons with disabilities. 237 F.3d at 103-04. Nonetheless, Judge Moran unsuccessfully argued that even though there was no duty to accommodate religion, the Orthodox Jewish students had stated a cause of action because the facially neutral Yale policy that required undergraduate students to live in co-educational residence halls had a discriminatory impact on their religion. *Id.* at 92. The majority opinion rejected the impact argument on the ground that the students had made no claim that the Yale policy would result in the under-representation of Orthodox Jews in Yale housing. 237 F.3d at 90-91. The majority opinion also made the dubious observation that because the students were seeking exclusion from housing and not inclusion, they did not state a claim under the Fair Housing Act. 237 F.3d at 90.

⁹⁵ The Fair Housing Act broadly defines the term handicap. 42 U.S.C. 3602(h). “Handicap” means a person who:

1. has “a physical or mental impairment which substantially limits one or more of such person’s major life activities”;
2. has “a record of having such an impairment”; or
3. is “regarded as having such an impairment... .”

The Act not only covers persons with disabilities but also anyone associated with them, such as family members or caregivers. 42 U.S.C. 3604(f)(1)(C).

The Act does allow a housing provider to deny a unit to any person whose tenancy would pose a “direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others.” 42 U.S.C. 3604(f)(9). However, a “direct threat” must be established by “objective evidence of overt acts that caused harm, or acts which directly threaten harm.” *Wirtz Realty Corp. v. Freund*, 721 N.E.2d 589, 597 (Ill. App. Ct. 1999). *But see*, *Key Youth Servs. v. City of Olathe*, 248 F.3d 1267, 1276 (10th Cir. 2001) (holding that the denial of a special use permit to a group home for troubled youth where some of the youth suffered from mental impairments did not give rise to a fair housing violation where it was shown that the city denied the request because of public safety concerns).

The same definition is contained in the 1973 Rehabilitation Act, 29 U.S.C. 705(8)(B), and in the Americans with Disabilities Act, 42 U.S.C. 12102(2).

In employment cases, the Supreme Court has held that a person whose impairment can be corrected by medication or corrective devices is not handicapped. *Sutton v. United Airlines*, 527 U.S. 471, 482-83 (1999) (ADA); *Murphy v. United Parcel Serv.*, 527 U.S. 516, 521 (1999) (ADA). These cases also hold that a disability must have a major impact on the person’s ability to perform activities that are of “central importance to daily life.” These cases have not been of concern in most housing discrimination cases. Almost by definition, if a person with a disability needs an accommodation to use or enjoy housing, the impact of the disability on the person would necessarily be of “central importance” to that person’s daily life. The impairment must also be permanent or long-term. *Toyota Motor Mfg., KY v. Williams*, 534 U.S. 184, 198 (2002).

administrative burden and is necessary for the person to use or enjoy the dwelling and not merely a preference.⁹⁶

Thus if a person with a disability needs to be accommodated by having a ramp built to a Chapel in the complex, has a dietary need associated with her disability, or cannot attend regular church services and needs to hold a religious service in her unit, a housing provider cannot refuse this request without establishing that it would be administratively or financially burdensome.⁹⁷

[*17] These requirements are not meant to accommodate the religious needs of the tenant or unit owner but to accommodate that person's disability so that the person can enjoy equal access to the unit and the services connected with it.⁹⁸

II. The First Amendment

Section 3601 of the Fair Housing Act specifically provides that the Act must be read in conformity with the Constitution.⁹⁹ Therefore, all clauses in the Fair Housing Act must conform to the requirements of the First Amendment.¹⁰⁰

⁹⁶ 42 U.S.C. 3604(f)(3)(A).

⁹⁷ See *United States v. Cal. Mobile Home Park*, 29 F.3d 1413 (9th Cir. 1994) (landlord must waive overnight guest fee to accommodate the needs of a disabled resident who needed a caregiver to sleep over); *Shapiro v. Cadman Towers*, 51 F.3d 328 (2d Cir. 1995) (condo association must move a disabled tenant to the head of the list for a parking space needed to accommodate the tenant's disability); *Green v. Housing Authority of Clackamas County*, 994 F. Supp. 1253 (D. Ore. 1998) (management must waive "no pet" policy to accommodate a person with a disability); *Giebeler v. M & B Associates*, 343 F.3d 1143 (9th Cir. 2003) (apartment owner must accommodate a tenant's disability by allowing a cosigner on the lease). In *HUD v. Ocean Sands, Inc.*, 2A Fair Hous.-Fair Lending (Aspen) 25,530 (H.U.D. A.L.J. Sept. 3, 1993), a housing provider was found liable for refusing to allow a disabled resident to install a wheelchair lift and walkways and make other minor changes in a unit.

⁹⁸ Under the Fair Housing Act, municipalities cannot directly discriminate against group homes for persons with disabilities. *E.g.*, *Alliance for Mentally Ill v. Naperville*, 923 F. Supp. 1057, 1078 (N.D. Ill. 1996) (A municipality cannot impose fire code provisions aimed specifically at homes for persons with disabilities if there are no special needs that justify treating these homes differently.) Municipalities may also have an affirmative duty to accommodate homes for persons with disabilities when they are being excluded because of zoning or other land use requirements. *E.g.*, *Hovsons, Inc. v. Township of Brick*, 89 F.3d 1096 (3d Cir. 1996) (nursing home given zoning variance to locate in residential area); *Smith & Lee Assocs. v. Taylor*, 102 F.3d 781 (6th Cir. 1996) (group home for elderly disabled persons could expand facility from six to twelve residents over city's objection that expansion was inconsistent with single family character of neighborhood); *Oconomowoc Residential Programs Inc. v. City of Milwaukee*, 300 F.3d 775 (7th Cir. 2002) (group home for developmentally disabled adults allowed a variance from an ordinance restricting group homes from operating within 2,500 feet of another community living arrangement); *Tsombanidis v. West Haven Fire Department*, 352 F.3d 565 (2d Cir. 2003) (group home for recovering alcoholics could operate in a single family neighborhood).

⁹⁹ 42 U.S.C. 3601.

¹⁰⁰ The First Amendment, which protects the free exercise of religion, only applies if there is governmental action. Therefore, while the Fair Housing Act itself must be read in accordance with the Constitution, the acts of private housing providers will not normally violate the First

A. *Burdening the Free Exercise of Religion*

1. Accommodating the Religious Practices of Residents

Government interference with the free exercise of religion violates the First Amendment.¹⁰¹ The HUD directive on Faith-Based [*18] Initiatives provides that religiously affiliated organizations are eligible to receive funding in their programs so long as the funds are not used for “inherently religious activities,” such as worship, religious instruction, or proselytism.¹⁰²

Under this rule, inherently religious activities must be offered separately, in time or location, from the programs, activities, or services supported by direct HUD funds and participation must be voluntary by the beneficiaries of the programs.¹⁰³ The term “time or location” is left undefined, but the HUD comments specify that HUD believes separation on the basis of time and location is legally unnecessary and would impose a harsh burden on small faith-based organizations.¹⁰⁴ Nonetheless, if religious and state-sponsored secular activities are not sufficiently separated, a violation of the Establishment Clause of the First Amendment could be alleged.

Even apart from the provisions of the Fair Housing Act, requiring a religious test for residency in any public housing unit could not be justified under the United States Constitution. A more difficult question is whether a public housing unit is required to make exemptions in otherwise neutral regulations to accommodate the religious practices of residents.

Employment Division v. Smith,¹⁰⁵ holds that a facially neutral law will be judged under the rationality standard of review normally employed by the

Amendment unless they are compelled or otherwise supported by governmental action. Mere financial support received by a private nursing home will normally not make the home a state actor to bring it under the First or Fourteenth Amendment. *Blum v. Yaretsky*, 457 U.S. 991, 1012 (1982) (private nursing home does not have to follow due process restrictions when discharging or transferring a patient). *See also* the Religious Freedom Restoration Act, 42 U.S.C. 1997(1)(A) and (2) (defining a “state institution”).

¹⁰¹ *See generally*, *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990); *Sherbert v. Verner*, 374 U.S. 398, 402 (1963).

¹⁰² 5 C.F.R. 5.109(c).

¹⁰³ *Id.*

¹⁰⁴ Equal Participation of Faith-Based Organizations, 69 Fed. Reg. at 41,716.

¹⁰⁵ 494 U.S. 872, 882 (1990). Justice Scalia, who wrote the opinion, refused to follow *Sherbert v. Verner*, 374 U.S. 398 (1963) (holding that the denial of unemployment benefits to a woman who was fired because of her refusal to work on the Sabbath infringed on her First Amendment rights) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (reversing the conviction of parents who refused to comply with a state compulsory education law because of their religious beliefs). Instead he relied on an older line of cases that applied minimal judicial scrutiny to free exercise claims, including *Reynolds v. United States*, 98 U.S. 145 (1879) (upholding a bigamy conviction against a person of the Mormon faith); *Prince v. Massachusetts*, 321 U.S. 158 (1944); (holding that a child labor law could be applied to prevent a minor from distributing religious literature); and *Braunfeld v. Brown*, 366 U.S. 599 (1961) (upholding a Sunday closing law as applied to Orthodox Jews who did not work on the Sabbath).

Supreme Court in economic and social cases. Thus, one could argue that a neutral regulation that infringes on a resident's free exercise of religion will be upheld so long as it is justified by a good reason. However, the application of the rationality standard to review facially neutral laws that restrict the practice of religion has been widely criticized.¹⁰⁶ Almost immediately [*19] after the Smith decision, Congress with overwhelming bi-partisan support passed the Religious Freedom Restoration Act (RFRA), which required laws that substantially burden the free exercise of religion to be justified by a compelling governmental interest.¹⁰⁷

The Supreme Court declared RFRA unconstitutional as applied to states and local governments in *City of Boerne v. Flores*.¹⁰⁸ The opinion is not the model of clarity. The Court held that Congress had no power under Section 5 of the Fourteenth Amendment to impose the RFRA against states and local governments. However, *Boerne* did not directly address the issue of the Act's constitutionality as applied to federal action, and lower courts have applied RFRA when reviewing acts of the federal government.¹⁰⁹

After the Supreme Court struck down RFRA, Congress passed the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA),¹¹⁰ which attempted to reinstate some of RFRA's requirements on the states in cases involving land use or the rights of institutionalized persons. Rather than relying on section 5 of the Fourteenth Amendment to pass the 2000 Act, as it had done in passing RFRA, Congress relied on the Spending and Commerce Clauses in Article 1, Section 8.¹¹¹ The Supreme Court has upheld RLUIPA against a challenge that it violates the Establishment Clause.¹¹²

If persons are in a state institution for the mentally ill, disabled, retarded, chronically ill, or handicapped, or in skilled nursing, intermediate or long-term care, or in a custodial or residential care facility, RLUIPA protects them. The State must have a compelling justification if it infringes upon their free exercise of religion.¹¹³ Thus, a public housing project for "institutionalized" persons that supplies meals to its residents may be required to accommodate the special dietary needs imposed by a particular resident's religious practices.¹¹⁴

¹⁰⁶ Congress twice expressed its disapproval of the test: first, in the Religious Freedom restoration Act, 42 U.S.C.2000bb (1993), and, after part of that Act was declared unconstitutional by the Supreme Court, in the Religious Land Use & Institutionalized Persons Act of 2000, 42 U.S.C. 2000cc-1 (2000). Justice O'Connor called for the Court to overturn the Smith opinion in her dissent in *City of Boerne v. Flores*, 521 U.S. 507, 546-548 (1997). Similar pleas to reconsider Smith were made by Justices Souter (521 U.S. at 565) and Breyer (521 U.S. at 566).

¹⁰⁷ 42 U.S.C. 2000bb-1 et seq.

¹⁰⁸ 521 U.S. 507 (1997).

¹⁰⁹ See *Guam v. Guerrero*, 290 F.3d 1210, 1219-21 (9th Cir. 2002); *O'Bryan v. Bureau of Prisons*, 349 F.3d 399, 401 (7th Cir. 2003).

¹¹⁰ 42 U.S.C. 2000cc-1 et seq. (2000).

¹¹¹ *Wilkinson*, 125 S.Ct. at 2118.

¹¹² See *id.* at 2117.

¹¹³ *Supra* note 111.

¹¹⁴ A federal judge has ruled that the RLUIPA was violated when prison officials refused to supply an inmate with a vegetarian diet based solely on his assertion that his religious beliefs required the

[*20] Some states have passed equivalents of RFRA, which they presumably have the right to do under their own constitutions.¹¹⁵ For instance, Illinois passed the Illinois Religious Freedom Restoration Act that provides that the government may not substantially burden a person's exercise of religion, even through rules of general application, without showing that it used the least restrictive means to further a compelling governmental interest.¹¹⁶ These laws impose more stringent standards for reviewing state interferences with religious practices than would be required under the federal Constitution.

Apart from RFRA or a state equivalent, there seems to be no independent basis under existing constitutional jurisprudence to require a public housing authority or other public funding entity to provide special assistance to enable residents to practice their religion. Indeed the neutrality required in some state constitutions toward religion may well justify a state's not making money available to support religious activities.

In *Locke v. Davey*,¹¹⁷ the United States Supreme Court held that a state that establishes a scholarship program to assist academically gifted students with postsecondary school expenses may exclude those students who are pursuing a degree in devotional theology. The student argued that the exclusion violated the Court's decision in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*¹¹⁸ because it was based on the state's hostility toward religion. The Supreme Court rejected this inference and held that the State was merely choosing not to fund a

special diet. *Agrawal v. Briley*, 2004 WL 1977581 (N.D. Ill. Aug. 25, 2004). The judge further held that the beliefs were protected even if they were not held by all members of the same religious group, stating that: "RLUIPA addresses the imposition of 'a substantial burden on the religious exercise of a *person*,' not a member of a religious group, and Congress enacted RLUIPA in the context of Supreme Court decisions holding that the First Amendment's free exercise clause protects an individual's right to follow his or her sincerely held religious belief." *Id.* at 3. The judge rejected arguments that any burden imposed on the inmate was justified by cost considerations or storage problems and concerns that providing the extra fruits and vegetables that come with meatless meals would lead to the production of more illicit alcohol. *Id.* at 9. She further rejected the idea that the special diet was so desirable that it would encourage other inmates to make false claims of religious need. *Id.* at 10.

¹¹⁵ States may expand rights beyond the minimum protected by the United States Constitution, so long as in doing so, they do not violate the rights of others. *See Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 79 (1980) (California extended the right of free speech to a private shopping center). *See also Michigan v. Long*, 463 U.S. 1032 (1983) (Michigan courts can expand the definition of an unreasonable search and seizure under state law, so long as the decision is clearly independent of federal law).

¹¹⁶ 775 ILCS 35/15. What a "substantial burden on the free exercise of religion" is has been narrowly construed. *Diggs v. Snyder*, 775 N.E.2d 40, 45 (Ill. App. Ct. 2002), *appeal denied*, 202 Ill.2d 601, 787 N.E.2d 156 ("To constitute a showing of a substantial burden on religious practice, [the claimant] must demonstrate that the governmental action 'prevents him from engaging in conduct or having a religious experience that his faith mandates.'").

¹¹⁷ 540 U.S. 712 (2004).

¹¹⁸ 508 U.S. 520 (1993) (held that the city had intentionally singled out religion when it penalized the ritual killing of animals).

distinct category of instruction.¹¹⁹ The State of Washington had inserted in its state constitution a specific prohibition against using tax funds to support the ministry, a prohibition that was broader than required by the [*21] Federal Constitution.¹²⁰ The Court found that far from evincing hostility toward religion, the Washington laws and corresponding programs permitted students to attend pervasively religious schools and to take devotional theology courses.¹²¹ The restriction on paying for devotional theology degrees was based on the distinction embodied in the Washington Constitution that training for a religious profession and training for a secular profession are not fungible.¹²²

While the Federal Constitution may not require a state to spend money in support of a religious activity as held in *Davey*,¹²³ a state cannot discriminate against religion in those facilities it makes generally available to the public.¹²⁴ For instance, if a publicly supported complex has a meeting room that it regularly makes available for private meetings, it cannot deny the facility to groups who want to conduct religious meetings or services in the room.¹²⁵

2. Investigating Religious Organizations

The United States Supreme Court has held that the mere investigation of a religious organization by a state Human Rights agency to determine whether a violation of the law has occurred does not pose an undue burden on the practice of religion.¹²⁶ In *Ohio Civil Rights Commission v. Dayton Christian Schools*,¹²⁷ the Supreme Court held that the mere investigation of a private religious school for discharging an employee on the basis of gender does not violate the First Amendment. Although the decision was concerned primarily with whether a federal court could enjoin the Commission under *Younger v. Harris*¹²⁸ abstention principles, the Court commented that:

Even religious schools cannot claim to be wholly free from some state regulation. *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972). We therefore think that however Dayton's constitutional claim should be decided on the merits, the Commission violates no constitutional rights by merely investigating the circumstances of Hoskinson's discharge in this [*22] case, if only to ascertain

¹¹⁹ *Supra* note 117 at 720-21.

¹²⁰ *Id.* at 719, 722.

¹²¹ *Id.* at 724-25.

¹²² *Id.* at 721.

¹²³ *Id.* at 725.

¹²⁴ *Good News Club v. Milford*, 533 U.S. 98, 106 (2001) (equal access to school premises after school hours).

¹²⁵ *Id.* at 113-120.

¹²⁶ *See Ohio Civil Rights Comm'n v. Dayton Christian Schools*, 477 U.S. 619 (1986).

¹²⁷ *Id.* at 628.

¹²⁸ 401 U.S. 37 (1971).

whether the ascribed religious-based reason was in fact the reason for the discharge.¹²⁹

However, if the investigation is unduly intrusive into the religious activities of the defendant or if it continues after the investigator should have known that no violation of the Act occurred, there could be a violation of the First Amendment. In *White v. Lee*,¹³⁰ pursuant to the filing of a complaint by the developer of a proposed group home, HUD investigators conducted a prolonged investigation against neighbors who protested the construction of the home. The neighbors had leafleted and filed protests with the city council, as well as filed a lawsuit against the home.¹³¹ The Court of Appeals held that the activities of the neighbors were legitimate free speech and petition activities and that the HUD investigators, by conducting an investigation long after they should have realized that these activities were protected by the First Amendment, could be held personally liable for damages in a civil rights action.¹³²

Harassing persons because of their religious beliefs would likewise be illegal and a civil rights violation.

3. The Fair Housing Exemption for Religion

A question might be raised whether the exemption in 3607(a) is sufficiently broad, as interpreted by the Courts, to protect First Amendment Rights. This question was raised on remand in *Columbus Country Club*, discussed in Part II C, above. The District Court considered whether extending the protection of the Fair Housing Act to a private club that wanted to restrict entrance to members of the same religion violated the Free Exercise Clause of the First Amendment.¹³³ The District Court rejected this argument, finding that compliance with the Fair Housing Act imposed no significant intrusion into the religious beliefs and practices of the Catholic members of the Club.¹³⁴

If a rule or regulation is neutral on its face and does not single out religious practices for special disadvantages, the Supreme Court has said that it will be upheld so long as it is otherwise [*23] constitutional.¹³⁵ Conversely, if the rule or regulation specifically singles out religious practices and proscribes or otherwise restricts them, there may be a violation of the First Amendment.¹³⁶ A

¹²⁹ *Supra* note 127 at 628.

¹³⁰ 227 F.3d 1214 (9th Cir. 2000).

¹³¹ *Id.* at 1220-21.

¹³² *Id.* at 1238-40.

¹³³ *United States v. Columbus Country Club*, 2 Fair Hous.-Fair Lending (Aspen) 17,098 (E.D. Pa. July 30, 1992).

¹³⁴ *Id.* at 17,099.

¹³⁵ *Employment Division v. Smith*, 494 U.S. 872, 890 (1990).

¹³⁶ *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534-40 (1993).

similar result would occur if some other fundamental right such as free speech or assembly were implicated.¹³⁷

A recent case involving free exercise issues relevant to this discussion is the California Supreme Court decision in *Catholic Charities v. Superior Court*.¹³⁸ Catholic Charities was required by California law to provide insurance which covered prescription contraceptives for its employees if it provided insurance coverage for other prescription drugs.¹³⁹ Catholic Charities raised a number of state and federal objections.¹⁴⁰ California law exempted “religious employers,” but it was an undisputed fact that Catholic Charities was not a “religious employer” as defined in the statute.¹⁴¹

Catholic Charities first argued that the law interfered with matters of religious doctrine and internal church governance, but the Court held that the case did not implicate internal church governance, only the relationship between a nonprofit public benefit corporation and its employees, most of whom did not even belong to the Catholic Church.¹⁴² The Court also rejected Catholic Charities’ argument that the government could not properly distinguish between secular and religious entities and activities.¹⁴³ Under the circumstances of this case, the Court held that there was no inquiry into the employer’s religious purpose and its employees’ and clients’ religious beliefs that would involve the government in an entanglement with religion.¹⁴⁴

Catholic Charities also argued that the law was not neutral because the practical effect of the law would reach only Catholic employers.¹⁴⁵ Even though the law was facially neutral, the Court recognized that the context in which a law operates could destroy its “neutrality.”¹⁴⁶ However, the Court found that while most religious employers did not object to the contraception coverage, the exception in the law was a justifiable accommodation to protect the [*24] beliefs of Catholics.¹⁴⁷ That the exemption was not so broad as to cover all organizations affiliated with the Catholic Church did not mean that the law discriminated against the Catholic Church.¹⁴⁸ The law simply treated some Catholic employers differently from other employers.¹⁴⁹

¹³⁷ In *Employment Division v. Smith*, 494 U.S. 872, 881-82 (1990), Justice Scalia referred to these cases as hybrid cases.

¹³⁸ 85 P.3d 67 (Cal. 2004), *cert. denied*, 125 S.Ct. 53 (2004).

¹³⁹ *Id.* at 74.

¹⁴⁰ *Id.* at 76.

¹⁴¹ *Id.*

¹⁴² *Id.* at 77.

¹⁴³ *Id.* at 80.

¹⁴⁴ *Id.* at 80-81.

¹⁴⁵ *Id.* at 82.

¹⁴⁶ *Id.* at 84.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 85.

The California Supreme Court also rejected the argument that the law implicated a hybrid right under *Employment Division v. Smith*,¹⁵⁰ finding that “Catholic Charities’ compliance with a law regulating health care benefits [was] not speech.”¹⁵¹ The California Supreme Court acknowledged that the California Constitution’s protection of the free exercise of religion might be more strict than the federal standard announced by Justice Scalia in *Smith*.¹⁵² However, the Court found that the state law did not in fact burden Catholic Charities’ religious beliefs; the conflict could be avoided simply by not offering coverage for prescription drugs.¹⁵³ Even assuming that there was a burden, the Court found that the State had a compelling state interest in eliminating gender discrimination and that the law was narrowly tailored to achieve that interest.¹⁵⁴ The United States Supreme Court has declined to review the decision of the California Supreme Court.¹⁵⁵

Although the issues in *Catholic Charities* were more broadly framed, the resolution of that case is consistent with the narrower arguments that were made under the exemptions to the Fair Housing Act in *United States v. Columbus Country Club*.¹⁵⁶ Housing that is used directly for religious activities is exempt; housing that generates revenue and is otherwise indistinguishable from other “commercially” operated properties is not exempt from the Act.

A more troublesome opinion is the United States Supreme Court’s decision in *Boy Scouts v. Dale*,¹⁵⁷ where it held that New Jersey could not extend its public accommodations law to require the Boy Scouts to reinstate a homosexual as an assistant scoutmaster. The Boy Scouts argued that New Jersey’s decision requiring the Boy Scouts to reinstate the complainant violated the Boy Scouts’ First Amendment right to free expression.¹⁵⁸

[*25] The Supreme Court held that the determination depends upon whether the group engages in “expressive association.”¹⁵⁹ The association need not be an advocacy group so long as it engages in some form of expression.¹⁶⁰ The Court found that the general mission of the Boy Scouts was “to instill values in young people.”¹⁶¹ As such, the Boy Scouts convinced a majority of the Justices that homosexual conduct was inconsistent with the Boy Scouts’ message of “clean living” and that a homosexual would not provide a desirable role model for the Scouts.¹⁶²

¹⁵⁰ 494 U.S. 872 (1990).

¹⁵¹ *Catholic Charities*, 85 P.3d at 89.

¹⁵² *Id.* at 89-91.

¹⁵³ *Id.* at 91.

¹⁵⁴ *Id.* at 93-94.

¹⁵⁵ *Catholic Charities v. Superior Court*, 125 S.Ct. 53 (2004).

¹⁵⁶ 2 Fair Hous.-Fair Lending (Aspen) 17,098 (E.D. Pa. July 30, 1992).

¹⁵⁷ 530 U.S. 640 (2000).

¹⁵⁸ *Id.* at 644.

¹⁵⁹ *Id.* at 648.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* at 653-54.

The Supreme Court distinguished Dale from *Roberts v. United States Jaycees*,¹⁶³ where it held that Minnesota could require the Jaycees to admit women because there was no evidence in the record to show how the admission of women would impede the organization's ability to engage in activities protected by the First Amendment or to disseminate its preferred views. It also distinguished Dale from *Rotary International v. Rotary Club of Duarte*,¹⁶⁴ where the Court held that a state antidiscrimination law requiring women be admitted as members of a local Rotary Club did not deny freedom of intimate association or freedom of expression to the club. In *Rotary Club of Duarte*, the Court held that even if there was a slight infringement on the club's expressive association, it was justified by the "compelling interest in eliminating discrimination against women."¹⁶⁵

The Supreme Court further distinguished the Boy Scouts organization from traditional places of public accommodation, such as facilities like inns, trains, and restaurants.¹⁶⁶ These were traditionally places where the public was invited.¹⁶⁷ Here, New Jersey broadly defined the term "public accommodation" to cover private membership organizations, which included non-commercial expressive organizations that were unassociated with any physical location.¹⁶⁸

The Fair Housing Act's exemption for religious organizations and exclusion of commercial transactions from that exemption draws a distinction similar to the distinction recognized by the Supreme Court between traditional places of public accommodation, where the court's have traditionally allowed antidiscrimination laws to [*26] apply,¹⁶⁹ and the broader definition of public accommodations adopted by New Jersey, which included associations that engage in expressive activities. Religious organizations that are providing housing as part of a commercial enterprise are not expressive organizations. They are more analogous to persons who operate inns or restaurants and who can be prohibited from refusing service to persons protected by the public accommodation laws.

Justice Powell drew a similar distinction in his concurring opinion in *Runyon v. McCrary*,¹⁷⁰ where the Court interpreted the reach of the Civil Rights

¹⁶³ 468 U.S. 609 (1984).

¹⁶⁴ 481 U.S. 537 (1987).

¹⁶⁵ *Id.* at 549.

¹⁶⁶ *Dale*, 530 U.S. at 656.

¹⁶⁷ *Id.* at 657.

¹⁶⁸ *Id.*

¹⁶⁹ See *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 84-88 (1980) (rejecting private property owners' argument that they were being required to participate in disseminating ideological messages that they might oppose); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 259 (1964) (hotel owner "has no 'right' to select its guests as it sees fit, free from government regulation").

¹⁷⁰ 427 U.S. 160, 187 (1976). Previously in *Jones v. Alfred H. Meyer Co.*, 392 U.S. 409 (1968), the Supreme Court had had no reservation about extending the Civil Rights Act of 1866, 42 U.S.C. 1982, to the private sales of homes.

Act of 1866¹⁷¹ to forbid a private school from discriminating on the basis of race in its admissions. Justice Powell distinguished between a contract made by parents with a private school to educate their children, which was covered by the Act, and a contract made by parents with a tutor or babysitter, which he termed a “personal contractual relationship” that he believed was not covered by the Act.¹⁷²

Writing for the majority in *Runyon*, Justice Stewart expressly recognized that the school was not a religious school and that it raised no religious defense.¹⁷³ However, Justice Stewart rejected arguments that applying the Civil Rights Act to the admissions practices of private schools violated any right of association or any privacy right of parents to direct the upbringing and education of their children.¹⁷⁴ His rejection of these associational and privacy arguments effectively disposed of any defense based on religion as well. Justice Scalia’s opinion in *Employment Division v. Smith* expressly held that restrictions on religious practice are accorded a lower level of scrutiny by the courts than those that also involve restrictions on speech or associational rights.¹⁷⁵

Thus, Congress drew the proper line between religious practice and commercial activity in the Fair Housing Act. Congress left the courts with the delicate task of applying the religious exemption to individual cases. Their decisions will necessarily be informed by the Supreme Court’s First Amendment jurisprudence, but the lower [*27] courts should go no further than this jurisprudence requires in applying the exemption.

4. Religion as a Defense to Discrimination - Conscientious Objection

Religion may also be raised as a defense to a charge of discrimination. What if the protected status of a housing resident conflicts with the religious beliefs of a provider of private housing? For instance, what if a couple wants to cohabit and cohabitation by unmarried persons conflicts with the religious beliefs of their landlord?¹⁷⁶

Clearly if the objection is based on what the Supreme Court has found to be a suspect classification under the Constitution such as race or gender, the government has a compelling justification to override the convictions of the housing provider.¹⁷⁷ However, if the discrimination is based on marital status,

¹⁷¹ 42 U.S.C. 1981 (2000).

¹⁷² *Supra* note 170 at 187-88.

¹⁷³ *Id.* at 167.

¹⁷⁴ *Id.* at 175-79.

¹⁷⁵ *Smith*, 494 U.S. at 881-82.

¹⁷⁶ Discrimination based on marital status does not violate the federal Fair Housing Act, but it may violate a number of state and local human rights laws and ordinances.

¹⁷⁷ See *Bob Jones Univ. v. United States*, 461 U.S. 574, 603-04 (1983) (race) and *Board of Dirs. of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (women).

sexual orientation, or even disability, the answer will be more complex, and lower courts have differed on the outcome.

In *Gay Rights Coalition v. Georgetown University*,¹⁷⁸ the Court of Appeals of the District of Columbia held that the District of Columbia, by placing sexual orientation discrimination in its human rights ordinance along with race, color, religion, national origin, and sex, had determined that “all forms of discrimination based on anything other than individual merit are equally injurious to the immediate victims and to society as a whole” and that the inclusion was justified by “a compelling governmental interest.”

Similarly in *Smith v. Fair Employment & Housing Commission*,¹⁷⁹ the Supreme Court of California held that religiously motivated landlords in California could not discriminate against gays when such discrimination is unlawful under state law. However, in *Attorney General v. Desilets*,¹⁸⁰ the Supreme Court of Massachusetts held that a landlord could validly object to renting to an unmarried couple in violation of a state law forbidding discrimination on the basis of marital status.

[*28] In situations where the Supreme Court has not recognized classes to be suspect under the Fourteenth Amendment, such as in cases involving discrimination against unmarried couples or against homosexuals, housing providers will argue that the government has insufficient reason to intrude on their religious beliefs.¹⁸¹ On the other hand, when housing providers have voluntarily entered the commercial housing market, they should be required to comply with the anti-discrimination laws that govern their businesses or leave the market.¹⁸² If they have religious scruples, they can invest their money and talent in another business or profession. There is no right under due process for any individual to engage in a particular business or profession.¹⁸³

The outcome of any discussion of the free exercise clause will depend on how closely the courts review the restriction. Justice Scalia’s opinion in *Employment Division v. Smith*,¹⁸⁴ holding that the rationality standard applies to laws that are neutral on their face even when they restrict the practice of religion,

¹⁷⁸ 536 A.2d 1, 31-38 (D.C. Cir. 1987). This decision is consistent with *Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537 (1987), where the Supreme Court held that eliminating gender discrimination was justified by a “compelling interest in eliminating discrimination against women,” even though gender discrimination itself is subject to a less searching scrutiny by the courts. *See, e.g.*, *Craig v. Boren*, 429 U.S. 190, 197 (1976); *Michael M. v. Superior Court*, 450 U.S. 464, 468-69 (1981); *United States v. Virginia*, 518 U.S. 515, 533 (1996).

¹⁷⁹ 913 P.2d 909, 12 Cal. 4th 1143, 51 Cal. Rptr.2d 700 (1996).

¹⁸⁰ 636 N.E.2d 233, 418 Mass. 316 (1994).

¹⁸¹ For instance, in *Board of Trustees v. Garrett*, 531 U.S. 356 (2001), the Supreme Court held that Congress did not have power to authorize damage suits against State agencies for discrimination against persons with disabilities under the Americans with Disabilities Act.

¹⁸² *Smith v. Fair Employment & Hous. Comm’n*, 913 P.2d 909 (Cal. 1996).

¹⁸³ *See Ferguson v. Skrupa*, 372 U.S. 726 (1963).

¹⁸⁴ *Employment Division v. Smith*, 494 U.S. 872 (1990). For a spirited defense of Justice Scalia’s opinion, see, *Hamilton, God v. the Gavel* (2005).

has been widely criticized.¹⁸⁵ Almost immediately after that decision, Congress, with overwhelming bi-partisan support, passed the Religious Freedom Restoration Act (RFRA), which required laws that substantially burden the free exercise of religion to be justified by a compelling governmental interest.¹⁸⁶

As discussed above, there is considerable debate as to whether RFRA applies to federal legislation that restricts the practice of religion and whether the newer amendments to RFRA in the Religious Land Use and Institutionalized Persons Act of 2000¹⁸⁷ are legal under the Spending and Commerce Clauses of the Constitution. If RFRA does not apply, there is the additional question of whether state equivalents of RFRA that provide a higher protection to religion than the Constitution, conflict with the Fair Housing Act and are thus preempted. If they are not preempted, one can legitimately argue that fair housing referrals by HUD to state or local human rights agencies pursuant to Section 3610(f) are improper because state requirements that provide for a broader review on the [*29] question of interference with religion are not substantially equivalent to those under federal law.¹⁸⁸

Regardless of the proper standard of review, one can argue that eliminating discrimination is a “compelling” governmental objective and that the religious beliefs of housing providers who decide to pursue an occupation in real estate are not a justification to discriminate in violation of the fair housing laws.

B. Protecting Against the Establishment of Religion

Trying to reconcile the Establishment Clause decisions of the United States Supreme Court requires a great amount of finesse. Whether there is indeed a wall of separation between Church and State¹⁸⁹ has been subject to varying interpretations by the Justices. Nonetheless there is no question that the government cannot support distinctly religious activities however the Court chooses to define them.

Although it may be motivated by a conviction founded on religion, the activity of housing persons is not in itself a distinctly religious activity. Therefore, there should be no problem under the Establishment Clause for the government to give money to private groups, whether religiously affiliated or secular, to develop housing.¹⁹⁰ However, if the money was used directly to construct a chapel or

¹⁸⁵ *Supra* note 106.

¹⁸⁶ 42 U.S.C. 2000bb-1 et seq. (2000).

¹⁸⁷ 42 U.S.C. 2000cc-1 et seq. (2000). The Religious Land Use and Institutionalized Persons Act was found not to violate the First Amendment by the Supreme Court. *Cutter v. Wilkinson*, 125 S.Ct. 2113 (2005).

¹⁸⁸ *See*, 42 U.S.C. 3610(f) (2000).

¹⁸⁹ *See*, *Everson v. Board of Education*, 330 U.S. 1, 16 (1947).

¹⁹⁰ *Cf.*, *Bradfield v. Roberts*, 175 U.S. 291 (1899) (government support for religiously operated hospitals is allowed).

other place of worship for the residents, there would be a problem.¹⁹¹ Such a use of funds is expressly prohibited by the HUD Faith-Based Initiatives directive.¹⁹²

[*30] Creating regulatory exemptions for religiously affiliated organizations will not necessarily violate the Establishment Clause. Justice Stevens argued in his concurring opinion in *City of Boerne v. Flores*,¹⁹³ that the RFRA violated the Establishment Clause because: “governmental preference for religion, as opposed to irreligion, is forbidden by the First Amendment.”¹⁹⁴ However, no other justice concurred with Justice Stevens.

In many instances, legislation that gives a special exemption to religious organizations is not really establishing a preference; it is simply accommodating the right of free exercise guaranteed by the First Amendment. For instance, legislation exempting religiously affiliated employers from the religious discrimination provisions of Equal Employment Opportunity Act does not breach

¹⁹¹ *Cf.*, *Roemer v. Board of Public Works*, 426 U.S. 736, 747 (1976) (holding that state funds could be given to private colleges, including those that are religiously affiliated, subject to the restriction that the funds not be used for “sectarian purposes.”).

Of course, with federal and state funding come restrictions. Whether organizations want to meet these restrictions is a serious question that each organization must answer before it becomes dependent on governmental subsidies. *Compare*, *Harris v. McRae*, 448 U.S. 297 (1980), (upholding the Hyde Amendment that prohibits Medicaid funds to be used to fund abortions); *Rust v. Sullivan*, 500 U.S. 173 (1991) (prohibiting recipients of federal funds to engage in abortion counseling services); *National Endowment for the Arts v. Finley*, 524 U.S. 569, 572 (1998) (National Endowment for the Arts can consider “general standards of decency and respect for the diverse beliefs and values of the American public” as criteria for considering grant applications); *United States v. Am. Library Ass’n*, 539 U.S. 194 (2003) (libraries that receive federal funds must install software to block images that constitute obscenity or child pornography and to prevent minors from obtaining access to material that is harmful to them); *with*, *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995) (public university cannot decline to authorize disbursement of funds to finance the printing of a Christian student newspaper when it funds other student publications); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001) (Congress cannot restrict legal services lawyers from representing clients in efforts to amend or otherwise challenge existing welfare laws). The Charitable Choice provisions of the 1996 Welfare Reform Act, 42 U.S.C. 604a, attempts to lift some restrictions that have traditionally prevented government funding for those faith-based projects that are included in the Act. However, the Act still must be read in conformity with the strictures of the First Amendment.

¹⁹² *See*, Equal Participation of Faith-Based Organizations, 69 Fed. Reg. 41,712 (July 9, 2004). The Directive states that “HUD funds may be used for the acquisition, construction, or rehabilitation of structures only to the extent that those structures are used for conducting eligible activities under a HUD program or activity.” *Id.* Sanctuaries, chapels, and other rooms that a HUD-funded religious congregation uses as its principal place of worship are ineligible for HUD-funded improvements. *Id.* However, “where a structure is used for both eligible and inherently religious activities, HUD funds may not exceed the cost of those portions of the acquisition, construction, or rehabilitation that are attributable to eligible activities in accordance with the cost accounting requirements applicable to the HUD program or activity.” *Id.* This qualification could obviously be challenged in its application to individual funding requests where it is shown that federal funds are being directed toward the support of religious activities.

¹⁹³ *City of Boerne v. Flores*, 521 U.S. 507 (1997).

¹⁹⁴ *Id.* at 537.

the Establishment Clause.¹⁹⁵ The Supreme Court stated in *Corporation of the Presiding Bishop v. Amos*¹⁹⁶ that:

This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause.’ ... It is well established, too, that “the limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause”.’ ... There is ample room under the Establishment Clause for “benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference”,’... . At some point accommodation may devolve into “an unlawful fostering of religion’¹⁹⁷

[*31] It can be argued that faith-based initiatives, which promote the participation of religiously affiliated organizations in government funded programs, move the fine line between neutrality and government support of religion too far in favor of the latter. However, whether faith-based initiatives violate the Establishment Clause of the First Amendment will depend upon how each individual initiative is structured.¹⁹⁸

¹⁹⁵ *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 339 (1987). Similarly, laws that recognize exemption from the military because of conscience do not violate the Establishment Clause. See *Gillette v. United States*, 401 U.S. 437 (1971).

¹⁹⁶ 483 U.S. 327 (1987).

¹⁹⁷ *Id.* at 334.

¹⁹⁸ Douglas Kauper observed almost a half century ago that:

“The overlapping of state and church functions in some respects and the necessity in some situations of making a choice between the free exercise and the nonestablishment limitations makes clear that many of the problems in this area are too complicated to admit of solution by simply invoking some rigid principle of separation of church and state.”

Kauper, *FRONTIERS OF CONSTITUTIONAL LIBERTY* (1956) at 131.

The solution suggested by Kauper still rings true today:

“Both the free exercise and the nonestablishment principles combine to outlaw any official church or religion of the state. All religious groups must be dealt with on an equal basis. The liberty of dissenters and unbelievers must be protected. The state may properly act to further religious interests or to promote general legislative policies without the necessity of discriminating against religion, if in so doing it does not grant a preference and does not act to coerce the conscience of others. To appropriate money for churches even on a non-preferential basis too clearly violates the nonestablishment principle to permit validation of the theory that the legislature is promoting the free exercise of religion, since it is not the function of a state to operate churches. On the other hand, financial assistance to auxiliary enterprises that represent overlapping functions of church and state can be justified, since by hypothesis no clear separation of function can be recognized.”

HUD's Faith-Based Initiative directive is fairly fine-tuned, but still presents some questions about how it might be implemented. The HUD directive has been criticized for failing to provide sufficient oversight mechanisms or "firewalls" to prevent religious use of government funds. However, HUD has responded that:

"Inappropriate use of HUD funds or failure to comply with HUD requirements is not a possibility that arises only when program participants are faith-based organizations. Failure of any organization receiving Federal funds to ensure that the Federal portion of their funding is not used for prohibited purposes will subject the organization or the imposition of sanctions or penalties."¹⁹⁹

The directive provides that religiously affiliated organizations are qualified to receive federal funding, and specifically refers to housing programs for the elderly and persons with disabilities. Federal monies may not be used to fund "inherently religious [*32] activities," which are defined as "worship, religious instruction, or proselytization." While this definition may not encompass all activities that run afoul of the First Amendment, but it does not appear on its face to be unduly vague or under inclusive. The directive also provides that participation in any activity must be voluntary for beneficiaries of the programs.

Recent Supreme Court opinions hold that the government may not exclude religious groups from programs that are generally open to the public. In *Board of Education v. Mergens*,²⁰⁰ the Supreme Court held that public school officials could not exclude a religious club at a public school under the Equal Access Act.²⁰¹ The Court held that the Equal Access Act did not violate the Establishment Clause under the three-part test developed in *Lemon v. Kurtzman*,²⁰² because it had a secular purpose, did not have a primary effect of advancing religion, and did not involve the government in excessive entanglement. The Act simply allowed religious groups the same privileges afforded all other groups.

Similarly, in *Rosenberger v. Rector and Visitors of the University of Virginia*,²⁰³ the Supreme Court held that a University that paid outside contractors for the printing costs of a variety of student publications could not withhold authorization for payments on behalf of a student paper that primarily advocated religious beliefs. The Court stated that having government officials determine

Id. at 132-3.

¹⁹⁹ Equal Participation of Faith-Based Organizations, 69 Fed. Reg. at 41,715.

²⁰⁰ 496 U.S. 226 (1990).

²⁰¹ 20 U.S.C. 4071-74 (2000).

²⁰² 403 U.S. 602 (1971).

²⁰³ 515 U.S. 819 (1995).

which papers were religious and which were not unduly involved the government in the entanglement of religion.²⁰⁴

Also, in *Capitol Square Review and Advisory Board v. Pinette*,²⁰⁵ the Court held that it does not violate the Establishment Clause when, pursuant to a religiously neutral state policy, the state permits a private party to display an unattended religious symbol in a traditional public forum located next to its capital building.

In a case upholding governmental aid for primary or secondary education, *Zelman v. Simmons-Harris*,²⁰⁶ where the State of Ohio offered tuition aid that is distributed directly to parents according to financial need for students in both public and private schools, whether religious or non religious, the Court found that the program had a secular purpose and effect and was “entirely neutral with respect to religion.”²⁰⁷

[*33] *Cutter v. Wilkinson*²⁰⁸ clearly holds that a law passed by Congress to accommodate religion does not automatically violate the Establishment Clause of the First Amendment. The Court upheld that Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) which prohibits states from imposing substantial burdens on the exercise of religion by persons confined in an institution unless they can be justified by “a compelling governmental interest.” While the Court acknowledged that “at some point, accommodation may devolve into “an unlawful fostering of religion,” RLUIPA did not, on its face, “exceed the limits of permissible government accommodation of religious practices.”²⁰⁹ The Court commented that Congress had documented that “‘frivolous or arbitrary’ barriers impeded institutionalized persons’ religious exercise,”²¹⁰ and found that the law alleviated exceptional government-created burdens on private religious exercise.²¹¹ The accommodation did not override other significant interests,²¹² and the Court deferred to the States to apply the law in a balanced and sensitive way.²¹³ Finally, the Court emphasized that the law did not differentiate among bona fide faiths. No religious sect was elevated above any other sect.²¹⁴

When the government steps over the line and promotes or endorses religious beliefs, it violates the Establishment Clause. In *County of Allegheny v. American Civil Liberties Union*,²¹⁵ the Supreme Court held that a display of a

²⁰⁴ *Id.* at 845-46.

²⁰⁵ 515 U.S. 753 (1995).

²⁰⁶ 536 U.S. 639 (2002).

²⁰⁷ *Id.* at 662.

²⁰⁸ 125 S.Ct. 2113 (2005).

²⁰⁹ *Id.* at 2117.

²¹⁰ *Id.* at 2119.

²¹¹ *Id.* at 2121.

²¹² *Id.* at 2122.

²¹³ *Id.* at 2123.

²¹⁴ *Id.*

²¹⁵ 492 U.S. 573 (1989). Similarly, in *McCreary County v. ACLU*, the Supreme Court held that two Kentucky counties violated the Establishment Clause when they displayed copies of the Ten

creche inside of a county building violated the Establishment Clause, but that a display of a Chanukah menorah outside the building next to a Christmas tree did not. The Court acknowledged that:

Precisely because of the religious diversity that is our national heritage, the Founders added to the Constitution a Bill of Rights, the very first words of which declare: “Congress shall make no law respecting an establishment of religion, or [*34] prohibit the free exercise thereof... .” Perhaps in the early days of the Republic these words were understood to protect only the diversity within Christianity, but today they are recognized as guaranteeing religious liberty and equality to “the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism.” *Wallace v. Jaffree*, 472 U.S., at 52. It is settled law that no government official in this Nation may violate these fundamental constitutional rights regarding matters of conscience. *Id.*, at 49.²¹⁶

The Court concluded that:

“Whether the key word is “endorsement,” “favoritism,” or “promotion,” the essential principle remains the same. The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from “making adherence to a religion relevant in any way to a person’s standing in the political community.” *Lynch v. Donnelly*, 465 U.S. at 687 (O’Connor, J., concurring).²¹⁷

In *Corporation of Presiding Bishop v. Amos*,²¹⁸ the Court held that the religious exemption in Title VII did not breach the Establishment Clause because it did not advance religion:

Undoubtedly, religious organizations are better able now to advance their purposes than they were prior to the 1972 amendment to 702. But religious groups have been better able to

Commandments in their courthouses. 125 S.Ct. 2722 (2005). The purpose of the display was to promote religion and the Commandments were fully set out so that they stood alone and not as part of an arguably secular display. *Id.* at 2738. However, in *Van Orden v. Perry*, the Court upheld the display of the Ten Commandments on the lawn of the Texas State Capital. 125 S.Ct. 2854 (2005). The Court found that while the Ten Commandments were undoubtedly religious, the nature of the display and the Commandment’s tie to our Nation’s history were found under the particular circumstances of that case to convey a predominantly secular message that did not breach the First Amendment. *Id.* at 2864.

²¹⁶ 492 U.S. at 589-590.

²¹⁷ *Id.* at 593-94.

²¹⁸ 483 U.S. 327, 336-37 (1987).

advance their purposes on account of many laws that have passed constitutional muster: for example, the property tax exemption at issue in *Walz v. Tax Comm'n*, [394 U.S. 664 (1970)], or the loans of school books to school children, including parochial school students, upheld in *Board of Education v. Allen*, 392 U.S. 236... (1968). A law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose. For a law to have forbidden “effects” under *Lemon*, it must be fair to say the *government itself* has advanced religion through its own activities and influence. As the Court observed in *Walz*, “for the men who wrote the Religion Clauses of the First Amendment the establishment of a religion connoted sponsorship, financial support, and active involvement of the [*35] sovereign in religious activity. 397 U.S., at 668, ... Accord, *Lemon*, 403 U.S., at 612,

What is significant in *Amos* is that the Supreme Court specifically found that there was no evidence in the record that the Title VII exemption gave the Church an advantage in propagating its religious mission that it did not possess before, stating that:

We find no persuasive evidence in the record before us that the Church’s ability to propagate its religious doctrine through the Gymnasium is any greater now than it was prior to the passage of the Civil Rights Act in 1964. In such circumstances, we do not see how any advancement of religion achieved by the Gymnasium can be fairly attributed to the Government, as opposed to the Church.²¹⁹

HUD faith-based initiatives program involves direct public subsidies to religious organizations, but these subsidies are to be kept separate and apart from secular activities and not for religious proselytism.²²⁰ It is unlikely under such circumstances that the Court would assume an advantage to the religious mission of the organization because of the receipt of the public funds alone.²²¹ Therefore,

²¹⁹ *Id.*

²²⁰ Equal Participation of Faith-Based Organizations, 69 Fed. Reg. at 41,713.

²²¹ The Supreme Court has held that while religiously affiliated organizations are not disabled from participating in publicly sponsored social welfare programs, the government may not fund “pervasively sectarian” institutions. *Bowen v. Kendrick*, 487 U.S. 589, 609-610 (1988) (the Supreme Court upheld a federal grant program that provided funding for services relating to adolescent sexuality and pregnancy to organizations with institutional ties to a religious denomination, but emphasized that the institution was not “pervasively sectarian”). However, a more recent decision questions this exclusion. In *Mitchell v. Helms*, a plurality opinion, the Court upheld Chapter 2 of the Education Consolidation and Improvement Act of 1981, under which

to attack the program as a violation of the Establishment Clause, actual proof would be required that the Government is indeed advancing religion.

The Department does not fund religious organizations directly. Faith-based groups are generally not-for-profit tax exempt organizations under section 501(c)(3) of the Internal Revenue Code.²²² The organizations that receive funding cannot discriminate in whom they serve.²²³ This would suggest that the Department [*36] applies the law neutrally. However, based on the fact that HUD singles out faith-based groups and designates personnel to assist such groups in their missions, a reasonable person could reach the conclusion that faith-based groups are preferred. For instance, in the Department's Notice of Funding Availability for Fiscal Year 2004, extra points are awarded "if you are a grassroots faith-based or other community-based organization, [or] propose to partner or sub-contract with grassroots faith-based or other community-based organizations."²²⁴ This preference is included in its 2005 funding request as well.²²⁵

In HUD funding notices, it is suggested that the reason for singling out faith-based groups is to overcome past discrimination against these groups.²²⁶ However, whether the government has a "compelling governmental interest" in overcoming past discrimination against religious groups is discounted by two Supreme Court decisions. The first case, *City of Boerne v. Flores*,²²⁷ held that the Religious Freedom Restoration Act was unconstitutional as applied to the states under section 5 of the Fourteenth Amendment because Congress did not have sufficient evidence of recent instances where states had discriminated on the basis of religion. Furthermore, a government may be justified in withholding funds from activities that run a risk of creating an appearance that it is favoring religion,

federal funds were distributed to states to lend educational materials directly to private schools, including parochial schools. 530 U.S. 793, 825-29 (2000).

²²² 26 U.S.C. 501(c)(3).

²²³ The White House takes the position that faith-based groups have a constitutionally-protected right to maintain their religious identity through hiring. See, e.g., <http://www.whitehouse.gov/news/releases/2002/12/20021212-6.html>. This would exempt them from Title VII's prohibitions on religious discrimination in hiring. 42 U.S.C. 2000e. See also *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 339 (1987) and the Charitable Choice Act of 1996, 42 U.S.C. 604a(f), which provides that: "a religious organization's exemption provided under section 200e-a of this title regarding employment practices shall not be affected by its participation in, or receipt of funds from, programs described in subsection (a)(2) of this section."

²²⁴ See 69 Fed. Reg. 27,147 (May 14, 2004).

²²⁵ See 70 Fed. Reg. 13,567 (March 21, 2005).

²²⁶ In its 2005 NOFA, HUD stated that its final rule was issued "to remove barriers to the participation of faith-based organizations in eight HUD programs." (Emphasis supplied.) 70 Fed. Reg. 13,579 (March 21, 2005). In its discussion of the public comments to the proposed HUD rule providing for equal participation of faith-based organizations, it was stated that "HUD's general objective is to eliminate barriers to faith-based organizations, to welcome their participation in HUD programs, and most important, to ensure they are treated like other program participants." 69 Fed. Reg. 41,714 (July 9, 2004).

²²⁷ 512 U.S. 507 (1997).

even if the funding itself might not be in strict violation of the Establishment Clause. The second case, *Locke v. Davey*,²²⁸ held that deference would be given to a state refusal to fund a religious project in order to avoid the appearance of supporting religion. These cases place a heavy burden on the Department to justify overcoming past discrimination through an executive-imposed, as opposed to a legislatively-imposed, faith-based initiative program.

Affirmatively promoting faith-based initiatives also opens the door to problems not only of decreased neutrality, but also of governmental entanglement with religion. Determining what is or is [*37] not a faith-based organization²²⁹ and whether a faith-based organization is using its funds for improper sectarian purposes²³⁰ can raise entanglement problems.²³¹ Whether neutral standards applicable to all grantees and particular delicacy in administering these programs can alleviate them is of utmost importance to those who see the First Amendment as the bedrock of the American experience.

III. Conclusions

At first blush, the First Amendment would probably not win many popularity contests today. A block of Justices on the Supreme Court would give both the Establishment and the Free Exercise Clauses a very narrow interpretation. Members of Congress, the President, and state officials regularly speak out in favor of prayer in the public schools, more public funding for religious organizations, and greater tolerance for public displays of religious symbols. Public officials do not win elections by urging a strict separation of

²²⁸ 124 S.Ct. 1307 (2004).

²²⁹ See, e.g., *United States v. Ballard*, 322 U.S. 78, 87 (1944) (holding that the courts cannot inquire into the truth or falsity of religious beliefs); *Cantwell v. Connecticut*, 310 U.S. 296, 307 (1940) (invalidating a state law that gave public officials the power to determine what were religious causes because it was a censorship of religion). What is a religion is far from clear. In *Davis v. Beason*, the Supreme Court states that the term religion references one's views on his relationship to his Creator, 133 U.S. 333, 341 (1890); however, in *Torcaso v. Watkins*, the Court recognized that a religious belief need not be equated with a belief in God. 367 U.S. 488, 495 (1961). In construing the Selective Service Act, the Supreme Court held that a religious belief was a "sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption." *United States v. Seeger*, 380 U.S. 163, 176 (1965); *Welsh v. United States*, 398 U.S. 333 (1970). Presumably there is nothing wrong with testing the sincerity of a person's religious beliefs. *Thomas v. Review Board*, 450 U.S. 707 (1981); *Frazee v. Illinois Department of Employment Security*, 489 U.S. 829 (1989).

²³⁰ Cf., *Agostini v. Felton*, 521 U.S. 203, 233 (1997) (The Court held that the Title I program, which allowed public school teachers and guidance counselors to provide teaching and counseling services in sectarian schools, did not unduly entangle the government with religion because it did not require "pervasive monitoring by public authorities" to ensure that public employees did not inculcate religion).

²³¹ These problems can, however, be overcome through sensitive administration. In *Cutter v. Wilkinson*, the Supreme Court assumed that the law would be applied in an appropriately balanced way. 125 S.Ct. 2113, 2123 (2005).

Church and State. Recent Supreme Court decisions reflect this public mood²³² and have raised heated public debates about the Court's role [*38] in interpreting the Constitution. But on reflection, the First Amendment religion clauses work. They ensure the effective operation of our democratic system and explain why our pluralistic society has avoided many of the religious conflicts that have engulfed the rest of the world. It is my belief that America is one of the most religiously diverse countries in the world, and this may be due, in part, to the separation of Church and State.

The Fair Housing Act's promise of fair and equal housing for all persons, and the First Amendment's promise of government neutrality in matters of religion are not incompatible. We are a nation of great diversity. Unfortunately our housing patterns do not always reflect this fact. Proper enforcement of the Fair Housing Act's promise of equal housing opportunity and of the First Amendment's guarantee to protect the practice of religion without the government establishing religion can help ensure that all persons live comfortably together in our pluralist society and that all persons have access to safe, decent, and sanitary housing where they can exercise their right to worship or not to worship as they choose.

²³² Justice Breyer acknowledged the role of public sentiment in his concurring opinion in *Van Orden v. Perry*:

"But the Establishment Clause does not compel the government to purge from the public sphere all that in any way partakes of the religious... . Such absolutism is not only inconsistent with our national traditions, ... but would also tend to promote the kind of social conflict the Establishment Clause seeks to avoid." 125 S.Ct. 2854, 2868 (2004).

He concludes his opinion, which upholds the display of the Ten Commandments on the Texas Capital Grounds, by stating that:

"This display has stood apparently uncontested for nearly two generations. This experience helps us understand that as a practical matter of degree this display is unlikely to prove divisive. And this matter of degree is, I believe, critical in a borderline case such as this one... At the same time, to reach a contrary conclusion here, based primarily upon the religious nature of the tablets' text would, I fear, lead the law to exhibit a hostility toward religion that has no place in our Establishment Clause traditions. Such a holding might well encourage disputes concerning the removal of longstanding depictions of the Ten Commandments from public buildings across the nation. And it could thereby create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid." *Id.* at 2871.

It is a sad day when a Justice of the Supreme Court acknowledges that his decision was shaped by which side is likely to yell the loudest. Decisions interpreting the First Amendment should not be influenced by the shrill criticism of zealous "true believers" who would lower the wall of separation between Church and State through intimidation and threats and not through the persuasiveness of their arguments.