

# THE MOST IMPORTANT RIGHT WE THINK WE HAVE BUT DON'T: FREEDOM FROM RELIGIOUS DISCRIMINATION IN EDUCATION

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Few civil rights are more central than our freedom from religious discrimination. By this I mean not only the free exercise of religion and the freedom from an established church protected under the First Amendment, but also the freedom from discrimination on the basis of religious affiliation protected under the Equal Protection Clause of the Fourteenth Amendment. Congress recognized the fundamental importance of this latter right in 1964, when it acted to prohibit discrimination on the basis of race, color, national origin, or religion in programs and activities that receive federal financial assistance, including both public and private post-secondary institutions. The way the President and Congress acted to overcome our nation's legacy of religious discrimination, like our tragic legacy of racial and ethnic discrimination, is one of the great stories of America's Second Reconstruction.

We know this, as we know the basic protections that we as Americans have from invidious discrimination. The growing litany of grounds on which we and our children may not be discriminated grows with each generation, but the first and fundamental protections established during the Civil Rights Era were the freedoms from discrimination on the basis of race, color, national origin, sex, and religion. Under the leadership of President Johnson, Congress acted decisively in 1964 to ensure that federal funds would not be used to support religious discrimination in America's schools. If only this were true.

How could this not be true? Senator Sam Ervin explained at the time that "the discrimination condemned by [Title VI] occurs . . . when an individual is treated unequally or unfairly because of his . . . religion . . ."<sup>1</sup> The Supreme Court noted in *Cannon v. University of Chicago* that, "victims of discrimination on the basis of . . . religion . . . have had private Title VI remedies available . . . since 1965 . . ."<sup>2</sup> Over the years, court after court has recognized that

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<sup>1</sup> 110 CONG. REC. 5612 (daily ed. Mar. 18, 1964), quoted by Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 338 (1978) (Brennan, J., dissenting).

<sup>2</sup> 441 U.S. 677, 709 (1979).

Title VI prohibits religious discrimination together with discrimination on the basis of race, color, and national origin.<sup>3</sup> The courts have made this point repeatedly, if casually, in the course of addressing other matters. Typically they have referred to the Title VI prohibition on religious discrimination in the course of surveying the pantheon of anti-discrimination protections. The courts have not been alone in this. President Clinton recalled in an executive order that “discrimination on the basis of . . . religion . . . [is prohibited under] Title VI of the Civil Rights Act[ ] of 1964 . . . .”<sup>4</sup> They said this. But it is not true.

In fact, Title VI prohibited discrimination on the basis of “race, color, or national origin,” but not on the basis of religion.<sup>5</sup> This set of prohibited classifications was subsequently expanded by legislation banning animus based on sex, disability, or age.<sup>6</sup> The list was even recently expanded to include membership in the Boy Scouts and other patriotic youth organizations.<sup>7</sup> But religious discrimination in federally assisted activities, such as universities and public schools, was never statutorily barred, despite the false memories that appear to litter our collective constitutional unconscious. There are of course prohibitions on some aspects of religious discrimination under such authorities as the Free Exercise Clause, the Establishment Clause, and the Equal Access Act;<sup>8</sup> in some state laws and local ordinances;<sup>9</sup> and in the standards of some post-secondary accreditation agencies.<sup>10</sup> Yet it is still the case that no statute bars federal funding of institutions that discriminate against students on the basis of their religious affiliation in a manner akin to the statutes prohibiting race and sex discrimination. Moreover, while the right has theoretically been established under the Equal Protection Clause (at least with respect to public institutions), no administrative agency is authorized to enforce its violation, and a court reviewing the claim post-*Employment Division, Department of Human Resources of Oregon v. Smith* would likely decide it under a rational basis

<sup>3</sup> See cases cited in Kenneth L. Marcus, *Anti-Zionism as Racism: Campus Anti-Semitism and the Civil Rights Act of 1964*, 15 WM. & MARY BILL RTS. J. (forthcoming 2007). Susan Tuchman first informed me of the numerous authorities for the proposition that Title VI prohibits religious discrimination.

<sup>4</sup> Exec. Order No. 13,160, 65 Fed. Reg. 39,775 (June 27, 2000) (Nondiscrimination on the Basis of Race, Sex, Color, National Origin, Disability, Religion, Age, Sexual Orientation, and Status as a Parent in Federally Conducted Education and Training Programs).

<sup>5</sup> 42 U.S.C. § 2000d (2000). Specifically, Title VI provides that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”

<sup>6</sup> See Title IX of the Education Amendments Act of 1972, 20 U.S.C. §§ 1681–1688 (2000) (sex); Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a) (2000) (disability); Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12131 (2000) (disability); the Age Discrimination Act of 1975, 42 U.S.C. §§ 6101-6107 (2000) (age).

<sup>7</sup> 20 U.S.C.A. § 7905 (West 2006) (the Boy Scouts of America Equal Access Act).

<sup>8</sup> 20 U.S.C. § 4071 (2000).

<sup>9</sup> See, e.g., Pennsylvania Fair Educational Opportunities Act, 24 PA. STAT. ANN. § 5001 (West 2006) (first enacted as P.L. 776, July 17, 1961), available at <http://www.maec.org/pal/edopact.html>.

<sup>10</sup> See, e.g., American Bar Association, *Standards for Approval of Law Schools: 2005-2006*, Standard 211 at 16-17 (2005), available at <http://www.abanet.org/legaled/standards/2005-2006standardsbook.pdf>.

standard.<sup>11</sup> In other words, while players of Little League Baseball are extended federal administratively-enforced civil rights protections in public schools,<sup>12</sup> Muslims, Hindus, and Christians are not.

So what do we make of the numerous authorities who have said that Title VI does prohibit religious discrimination? Were they simply mistaken? Did they not know that Title VI prohibits discrimination in federally assisted programs and activities only on the basis of “race, color, or national origin” and not on the basis of religion?<sup>13</sup> Was it a simple slip of the pen? If so, then why has the pen slipped so frequently in this regard? Do these frequent slips indicate something deeper about the forgotten absence of religion from among the Title VI pantheon? Is it enough simply to point out that so many other civil rights statutes prohibit religious discrimination, together with discrimination on these other bases? And does this dispel the confusion or does it only highlight the oddity of the omission? This short Essay will explore these questions and argue that Congress’ deletion of religion from the legislation that became Title VI created a significant gap in the structure of both the Civil Rights Act of 1964 (“1964 Act”), and, more generally, the federal system of civil rights enforcement that cries out for legislative correction.

It is well known that Congress’ core concern in enacting the 1964 Act was not to ameliorate discrimination generally in all of its manifestations, but very specifically to relieve the plight of African Americans.<sup>14</sup> Since Congress’ primary concern was black-white relationships, its long deliberations shed little light on matters of religious discrimination,<sup>15</sup> just as they cast little light on matters of national origin.<sup>16</sup> Congress’ over-arching goal in passing Title VI was, however, quite clear. Congress’ intent was to prevent federal agencies, such as the Department of Education, from funding programs that discriminate against certain students on grounds that violate the Thirteenth and Fourteenth Amendments.<sup>17</sup> In this respect, Congress was working to finish up business left over from the First Reconstruction.

Title VI achieves this goal through a tripartite enforcement system: private party litigation in the federal courts; Justice Department intervention in certain matters of particular public import, such as cases evincing a pattern and practice of discrimination; and administrative enforcement through civil rights enforcement agencies within departments of the federal government. These mechanisms, developed in the so-called Second Reconstruction, provided the

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<sup>11</sup> See *Employment Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990) (applying a rational basis test in *Smith* to hold that members of the Native American Church were not constitutionally entitled to ingest peyote in the face of a generally applicable Oregon law forbidding its use).

<sup>12</sup> See The Boy Scouts of America Equal Access Act, 20 U.S.C.A. § 7905 (West 2006).

<sup>13</sup> Under Section 601 of the Civil Rights Act of 1964 (codified as amended at 42 U.S.C. § 2000d (2000)), no person shall, “on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity” covered by Title VI.

<sup>14</sup> See, e.g., Juan Perea, *Ethnicity and Prejudice: Reevaluating “National Origin” Discrimination Under Title VII*, 35 WM & MARY L. REV. 805, 806 (1994).

<sup>15</sup> See Marcus, *supra* note 4.

<sup>16</sup> Perea, *supra* note 15, at 817-21.

<sup>17</sup> Marcus, *supra* note 4; *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 286-87.

practical means of enforcing First Reconstruction-era rights that were otherwise left unfulfilled. The intent of this legislation was to ensure that the rights created in the Thirteenth and Fourteenth Amendment would not be violated, with federal assistance, in programs and activities such as schools and colleges.

But the fact is that Title VI does not prohibit discrimination on the basis of religion, even though the 1964 Act elsewhere prohibits religious discrimination in other contexts.<sup>18</sup> It appears that Congress stripped religious discrimination from Title VI because certain key members wanted to preserve the ability of religiously affiliated colleges to discriminate in favor of co-religionists in admissions and extra-curricular activities such as choir.<sup>19</sup> The original version of the bill that would become Title VI, drafted by the Department of Justice, actually banned religious discrimination in federally assisted programs or activities, together with a handful of other prohibited classifications.<sup>20</sup> The 1964 Act's House sponsor, Judiciary Committee Chairman Emanuel Celler, explained during floor debate that he wanted to permit denominational colleges to engage in certain forms of discrimination in favor of co-religionists.<sup>21</sup> Celler stated that he was trying to "avoid a good many problems" relating to funding that "goes to sectarian schools and universities."<sup>22</sup> He elaborated that "for these reasons, the subcommittee and, I am sure, the full committee or the majority thereof deemed it wise and proper and expedient – and I emphasize the work 'expedient' – to omit the word 'religion.'"<sup>23</sup> It was in this way that religious protection was shorn from Title VI.

If it is so clear that that Congress deliberately omitted religion from Title VI, then why have so many authorities gotten it wrong? Was Celler's grim deed repressed like a trauma to our constitutional psyche? To start with, it must be acknowledged that every one of the erroneous references appears in *dicta*, unaccompanied by any reasoning or analysis, and appears to be a simple misstatement unconnected to the Court's holding. In each case, the term "religion" appears within a boilerplate catalog of discriminatory classifications. Senator Ervin's error may be due to the bill's evolution. The courts' errors may be similarly understandable in light of the inclusion of religion in so many other antidiscrimination authorities. On the other hand, the sheer frequency with which the courts have made this same error may suggest a deeper point; the exclusion of religion from the list of prohibited bases of discrimination is counterintuitive because it does not sit well with the text of the statute taken as a whole, with the structure of federal civil rights law, or with congressional intent to prevent government funding of unconstitutional discrimination.

Religion was nearly always what one might call a "usual suspect" classification in antidiscrimination efforts before the 1964 Act, elsewhere in the 1964

<sup>18</sup> The 1964 Act prohibits religious discrimination most prominently, of course, in Title VII. 42 U.S.C. §§ 2000e to 2000e-17 (2000).

<sup>19</sup> See generally Marcus, *supra* note 4.

<sup>20</sup> 110 CONG. REC. 2462 (daily ed. Feb. 7, 1964).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* Celler also alluded to other rationales for the omission, but they are less than persuasive.

Act, and subsequent to the 1964 Act.<sup>24</sup> For example, in 1941, President Franklin D. Roosevelt issued an executive order prohibiting discrimination in the federal government and in the defense industry on grounds of “race, creed, color, or national origin.”<sup>25</sup> In 1948, President Harry S. Truman proposed legislation to prohibit federal employment discrimination or unequal treatment in the military on grounds of “race, color, religion, or national origin.”<sup>26</sup> The Civil Rights Act of 1957 established the U.S. Commission on Civil Rights to investigate discrimination on the basis of “color, race, religion, or national origin” in voting and elsewhere.<sup>27</sup> In 1960, President Dwight D. Eisenhower proposed legislation to strengthen voting rights, announcing to Congress that individuals are entitled to equal protection regardless of “race, religion, or national origin.”<sup>28</sup> As previously noted, the legislation that evolved into the 1964 Act included numerous prohibitions on religious discrimination. Subsequent legislation, such as the Civil Rights Act of 1968, added “sex” but continued to prohibit discrimination on the basis of “race, color, religion, sex, or national origin.”<sup>29</sup> In sum, freedom from discrimination based on “religion” or “creed” has been a central, protected, civil right throughout the entire modern era.

The jagged hole created when Congress ripped religion from Title VI is rather stark. Consider this: the 1964 Act prohibits discrimination in employment, but not, generally, in education, although no evidence suggests that religious discrimination was either less prevalent or less harmful in schools than in the workplace. In education, the 1964 Act provides, anomalously, two mechanisms that address religious discrimination. First, the Attorney General is given some, limited authorization to sue public colleges that deny admission on the basis of race, color, religion, sex, or national origin in a way that limits educational desegregation.<sup>30</sup> This provision was obviously intended to promote post-secondary racial desegregation, not religious desegregation, and the inclusion of religion in this provision was likely a rote recitation of the usual suspect classifications.

Second, the Attorney General is authorized to intervene in certain pending Equal Protection litigation claiming discrimination “on account of race, color, religion, sex or national origin” if the case is of sufficient public importance.<sup>31</sup> In other words, the Justice Department may join in pending, high-profile, Fourteenth Amendment religious discrimination cases, but may not institute actions on its own (except in the theoretical case of religious segregation<sup>32</sup>); and no

<sup>24</sup> See generally Perea, *supra* note 15, at 810-17 (*en passant*).

<sup>25</sup> Exec. Order No. 9346, 3 C.F.R. 1280 (1938-1943).

<sup>26</sup> Exec. Order No. 9980, 3 C.F.R. 720 (1943-1948); Exec. Order No. 9981, 3 C.F.R. 722 (1943-1948).

<sup>27</sup> Pub. L. No. 85-315, § 104, 71 Stat. 634, 635 (1957).

<sup>28</sup> STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS 947 (Bernard Schwartz ed., 1970) (quoting President Eisenhower’s Special Message to Congress, Feb. 5, 1960).

<sup>29</sup> The Civil Rights Act of 1968, 42 U.S.C. §§ 3601-3631 (2000), also known as the Fair Housing Act.

<sup>30</sup> 42 U.S.C. § 2000c(a) (2000).

<sup>31</sup> 42 U.S.C. § 2000h-2 (2000).

<sup>32</sup> Religious segregation is not unknown in the history of American college campuses. For example, Syracuse University housed Jews separately from Christian students at Syracuse

federal agency is authorized to investigate run-of-the-mill religious discrimination cases at educational institutions or cases in which the victim has been unable to secure private counsel. No rational legislator would provide students with these, and only these, protections against religious discrimination. The existence of these limited, anomalous protections merely highlights the significance of the gap created by the omission of religion from Title VI. Indeed, the discrepancy can only be explained as a rather ham-handed effort to cut from the 1964 Act any provision that appeared to threaten parochial education. The irony is that a bit of deft draftsmanship could easily have shielded religiously affiliated institutions from any risk that might otherwise have been entailed in protecting students from religious discrimination.

Why is it important to correct this unnecessary omission, forty-one years after the fact? First, it is necessary to effectuate the primary intent underlying Title VI: to ensure that federal funds will not be used to support activities prohibited under the Constitution. Religious discrimination is clearly prohibited by the Fourteenth and, some might argue, also by the Thirteenth Amendment. As a basic matter of public policy, the federal government should not fund activities banned under the Constitution. Second, religious discrimination should be policed with particular zeal because it has a dual quality absent in other forms of bigotry.<sup>33</sup> As with the other forms of discrimination, religious discrimination stigmatizes groups that have historically faced prejudice and bigotry in this country. Moreover, religious discrimination burdens the exercise of activities which our constitutional culture holds as having a particular social value.<sup>34</sup> Third, religious discrimination should be policed because it is so closely interrelated with racial and ethnic discrimination that a religious exception to our anti-discrimination rules otherwise allows religious discriminators to escape sanction when acting under the guise of religious bigotry. This point has been demonstrated elsewhere in the context of jury selection.<sup>35</sup> It is no less true with respect to educational discrimination. Fourth, by banning ethnic discrimination without also banning religious discrimination, Title VI anomalously extends greater protections to members of religious groups that share ethnic or ancestral characteristics than to groups that do not.<sup>36</sup> The issue becomes harder, not easier, when it is observed that religious discrimination has an obvious disparate impact on certain ethnic groups; *e.g.*, discrimination

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University from 1927 to 1931. Other universities provided separate dormitories for Jewish students, and many fraternities barred Jews. See LEONARD DINNERSTEIN, *ANTI-SEMITISM IN AMERICA* 84-86 (1994). On the other hand, no serious scholar would suggest that religious segregation has been the most serious or most prevalent form of religious discrimination in post-secondary education or that it is has been a significant issue in the last half century.

<sup>33</sup> See generally, Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245 (1994).

<sup>34</sup> See Michael W. McConnell, *Why is Religious Liberty the "First Freedom"?*, 21 CARDOZO L. REV. 1243 (2000).

<sup>35</sup> Daniel M. Hinkle, *Peremptory Challenges Based on Religious Affiliation: Are They Constitutional?*, 9 BUFF. CRIM. L. REV. 139, 169-173 (2005).

<sup>36</sup> See *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 617-18 (1987) (holding that the prohibition on racial discrimination within the Civil Rights Act of 1866 applies to persons of Jewish ancestry).

motivated by anti-Jewish religious animus has a disparate impact on persons of Jewish ethnic or ancestral heritage.

The cleanest and best solution to this legislative problem would be a legislative fix: Congress should explicitly prohibit religious discrimination in federally funded educational programs and activities, including colleges and universities, just as it prohibits racial, color, national origin, sex, age, and disability discrimination at these institutions.<sup>37</sup> The core language could be adapted directly from Title VI (thereby resting its justification on the relatively firm Spending Clause foundation): “No person in the United States shall, on the ground of religion, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”<sup>38</sup> The legislation would then provide an enforcement structure for violations of the statute identical to the procedures provided for violations of Title VI and Title IX.

It is significant that substantially the same legislative solution has now been advanced in the law review literature as a solution to three quite distinct problems: student-on-student religious harassment in public schools,<sup>39</sup> the failure of some universities to provide reasonable accommodations to religious students,<sup>40</sup> and campus anti-Semitism.<sup>41</sup> In fact, each of these problems – and more could be cited (*e.g.*, anti-Christian viewpoint discrimination, Islamophobia, etc.) – is simply a discrete manifestation of a broader problem, *to wit*, Congress has not yet finished the job it began in 1964 of providing an enforcement mechanism to ensure compliance with the basic civil rights established in the Civil Rights Act of 1866 and codified in the Thirteenth and Fourteenth Amendments.

The legislation could easily be drafted in a way that would address Congress’ core interest in permitting federally funded, denominationally affiliated, educational institutions to discriminate in favor of co-religionists in admissions, *e.g.*:

Nothing in this provision shall be construed to limit a recipient of federal financial assistance which pursues a religious affiliation, mission or purpose from applying policies of admission of students and employment of faculty and staff that directly relate to this mission, affiliation or purpose, provided that the recipient does not engage in any form of discrimination prohibited under [Title VI, Title IX, the Age Discrimination Act, or the Americans with Disabilities Act].

Language of this sort would protect both the right of religious institutions to prefer co-religionists and the right of religious minorities to enjoy equal educational opportunities in all other institutions.

<sup>37</sup> See Erica L. Keller, Note, *I’m Telling! Who Cares?! Student-on-Student Religious Harassment in Public Schools*, 49 WAYNE L. REV. 1071 (2004) (noting the anomaly that religious harassment is not specifically barred, while racial, color, age, sex, and disability harassment are).

<sup>38</sup> See *id.* at 1082-83; Joshua C. Weinberger, Comment, *Religion and Sex in the Yale Dorms: A Legislative Proposal Requiring Private Universities to Provide Religious Accommodations*, 147 U. PA. L. REV. 205, 239 (1998).

<sup>39</sup> See Keller, *supra* note 38.

<sup>40</sup> See Weinberger, *supra* note 39.

<sup>41</sup> Marcus, *supra* note 4.

Alternatively, depending on legislative policy goals, statutory language could be drawn that would provide a somewhat lesser degree of religious exercise protection to recipient institutions but which would more vigorously guard the rights of other students. One potential model for such language already exists in a standard that the American Bar Association has issued for accreditation of American Law Schools. The ABA sets forth its basic “Non-Discrimination and Equality of Opportunity” requirements in Standard 210(a), which require that “[a] law school shall foster and maintain equality of opportunity in legal education . . . without discrimination or segregation on ground of race, color, *religion*, national origin, sex or sexual orientation.”<sup>42</sup> Those requirements are subject to a limited exception for religiously affiliated institutions which could be more broadly applied to ameliorate congressional (and constitutional) concerns: “This Standard does not prevent a law school from having a religious affiliation or purpose and adopting and applying policies of admission of students and employment of faculty and staff which directly relate to this affiliation or purpose . . . .”<sup>43</sup> The ABA subjects this exception to various conditions, such as prior notice to applicants and admitted students, and a requirement that the institution not violate any other standard.<sup>44</sup> The ABA further provides that Standard 210(a) “permits religious policies as to admission, retention, and employment only to the extent that they are protected by the United States Constitution” and that it “is administered as if the First Amendment of the United States Constitution governs its application.”<sup>45</sup> All of this simply demonstrates that the concerns expressed by Title VI’s sponsors can be addressed fairly easily, and with any desired stringency, using off-the-shelf legislative draftsmanship that has already been applied in similar contexts.

As discussed above, some members of Congress also had other, related concerns in omitting reference to “religion” from Title VI in 1964. For example, one Member indicated a desire to enable choirs to exclude non-co-religionists.<sup>46</sup> This interest raises a complicated set of constitutional issues. The congressional interest in permitting choirs to discriminate in favor of co-religionists is an example of the larger question as to whether universities must subsidize student groups that exclude potential members on the basis of religion – or, more broadly, whether discriminatory expressive associations have an equal right to government subsidies under the First Amendment. There is some authority for the proposition that universities that subsidize student groups must not discriminate against groups (including but not limited to religious groups) that adopt discriminatory criteria for the selection of members of officers.<sup>47</sup> Others argue that discriminatory expressive associations do not have a right to

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<sup>42</sup> American Bar Association, *Standards for Approval of Law Schools: 2005-2006*, Standard 210(a) at 14 (2005), available at <http://www.abanet.org/legaled/standards/2005-2006standardsbook.pdf> (emphasis added).

<sup>43</sup> *Id.* at Standard 210(e), 14-15.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> See generally, Marcus, *supra* note 4.

<sup>47</sup> See *Christian Legal Soc’y v. Walker*, 453 F.3d 853 (7th Cir. 2006).



obtain government subsidies and that it is unlikely that the Supreme Court would support their efforts to do so.<sup>48</sup>

To the extent that the former view should prevail (or to the extent that it is legislatively favored on policy grounds), this legislative proposal could be adjusted to include an exclusion for religious organizations similar to the exclusions found elsewhere in federal antidiscrimination law. For example, Title VII exempts religious organizations from the ban on religious discrimination in employment<sup>49</sup> and Title IX exempts religious organizations with contrary religious tenets.<sup>50</sup> If Congress should choose to accommodate religiously based expressive student associations in this manner, it could include a legislative exemption such as the following provision:

This title shall not apply to a religious student organization with respect to the selection of individuals of a particular religion to serve as members or officers of the association, if the application of this title would not be consistent with the religious tenets of such association, provided that the association may not discriminate in any other manner provided herein.

This is similar to the proposed exemption discussed above that would allow religious educational institutions to discriminate on the basis of religion in admitting students.

This legislative language is also likely to avert any Establishment Clause challenges that could otherwise, at least theoretically, face any new statute that may require private actors to provide religious accommodations to persons of faith. As Justice Kennedy has acknowledged, “[t]here is a point . . . at which an accommodation may impose a burden on nonadherents so great that it becomes an establishment.”<sup>51</sup> On the other hand, the Court has recently affirmed religious exemptions to generally applicable rules on a case-by-case basis, signaling its willingness to require religious accommodations in the face of Establishment Clause objections.<sup>52</sup> Indeed, the Court has gone so far as to ridicule the Establishment Clause argument against religious accommodation as “the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I’ll have to make one for everybody, so no exceptions.”<sup>53</sup>

<sup>48</sup> Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 STAN. L. REV. 1919, 1968 (2006).

<sup>49</sup> 42 U.S.C. § 2000e-1(a) (2000) contains the following provision: “This subchapter [42 U.S.C. §§ 2000e to 2000e-17] shall not apply to an employer with respect 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.”

<sup>50</sup> 20 U.S.C. § 1681(a)(3) (2000) provides that: “this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization.”

<sup>51</sup> *Bd. of Educ. v. Grumet*, 512 U.S. 687, 725 (1994) (Kennedy, J., concurring).

<sup>52</sup> *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 126 S. Ct. 1211 (2006) (holding that application of the Controlled Substances Act to a religious group’s sacramental use of hoasca violated the Religious Freedom Restoration Act of 1993 notwithstanding the government’s Establishment Clause arguments); *Cutter v. Wilkinson*, 544 U.S. 709 (2005) (holding that the Religious Land Use and Institutionalized Persons Act of 2000, which permits to seek religious accommodations, does not violate the Establishment Clause).

<sup>53</sup> *Gonzales*, 126 S. Ct. at 1223.

Conforming this proposal to the 1964 Act insulates it from Establishment Clause challenges to the same extent as the comparable discrimination protections contained in Title VI (and arguably more so than comparable protections in Title VII or Title VIII, which contain absolute prohibitions rather than conditions on government subsidies).<sup>54</sup> The prohibitions on discrimination and harassment in these provisions are all potentially subject to constitutional challenge, but their endurance, and long-standing judicial support, suggests a likelihood that they would survive challenge.

America's relationship with religious discrimination has been as central to its self-definition as any other challenge in its constitutional culture, excepting only issues relating to the freedom of expression and the evils of racial discrimination. This history has, however, been somewhat ambivalent, and its significance has been explicated and addressed in an oddly partial manner. America's status as a refuge from religious persecution has been a central aspect of our national mythology as well as our national history. Yet religious discrimination has been present on American shores from the outset,<sup>55</sup> and has been prevalent historically and to the present day.<sup>56</sup> Few would deny that religious discrimination has played a critical role in many important junctures of our nation's history, including the foundation of some of our states.<sup>57</sup> Evidence of continued discrimination, including discrimination in our public schools has been presented to Congress at critical junctures, including the period leading up to passage of the Civil Rights Act of 1964. In today's schools and colleges, religious discrimination remains a pressing issue.<sup>58</sup> This discrimination is not limited to the handful of issues that have released an avalanche of scholarship and litigation, *e.g.*, refusal to exempt religiously motivated conduct from generally applicable rules or selectively denying benefits to religiously motivated viewpoints.<sup>59</sup> More basic in some ways, and more pressing, have been the plight of

<sup>54</sup> The ramifications of this distinction are explored in Volokh, *supra* note 49.

<sup>55</sup> Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1422-24 (1990).

<sup>56</sup> See *Everson v. Bd. of Educ.*, 330 U.S. 1, 8-14 (1947) (describing history of religious discrimination); *but see City of Boerne v. Flores*, 521 U.S. 507, 508-09 (1997) (noting that Congress had not developed a sufficient record of religious discrimination to support the Religious Freedom Reformation Act).

<sup>57</sup> McConnell, *supra* note 55.

<sup>58</sup> See, *e.g.*, U.S. COMM'N ON CIVIL RIGHTS, CAMPUS ANTI-SEMITISM (2006), available at <http://www.usccr.gov/pubs/081506campusantibrief.pdf> (recounting anti-Jewish discrimination); Marilyn Elias, *USA's Muslims Under a Cloud*, USA TODAY, Aug. 9, 2006 (updated Aug. 10, 2006), [http://www.usatoday.com/news/nation/2006-08-09-muslim-american-cover\\_x.htm](http://www.usatoday.com/news/nation/2006-08-09-muslim-american-cover_x.htm) (recounting anti-Muslim and anti-Sikh discrimination); COUNCIL ON AMERICAN-ISLAMIC RELATIONS, THE STATUS OF MUSLIM CIVIL RIGHTS IN THE UNITED STATES 12 (2006) (reporting 162 anti-Muslim acts in American schools in 2005), available at <http://www.cair.com/pdf/2006-CAIR-Civil-Rights-Report.pdf>.

<sup>59</sup> While an avalanche by definition frustrates easy citation, a few illustrative examples might include, *e.g.*, Gerard Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 HOFSTRA L. REV. 245 (1991); Eisgruber & Sager, *supra* note 34; Philip Hamburger, *Essay, More is Less*, 90 VA. L. REV. 835 (2004); John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279 (2001); Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933 (1989); William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 309 (1991); McConnell, *supra* note 56;

Sikh children beaten on playgrounds for their religious headdress or Muslim children taunted for Osama Bin Laden. In terms of our national constitutional psychology, it is in some ways unsurprising that the decision to deny these groups protections afforded to other minorities should be so significantly repressed. Protecting them adequately would require only a modest legislative effort but its payoff, in terms of both the protection of these individual students and the repair of a tear in the fabric of our civil rights law, would be immense.

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James E. Ryan, *SMITH and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1409 n.15 (1992); Mark Tushnet, *The Rhetoric of Free Exercise Discourse*, 1993 BYU L. Rev. 117 (1993); Volokh, *supra* note 49.