Chapter 7:
Conclusion

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The preceding chapters by our graduate fellows at the Center for First Amendment Studies reveal the unsettled nature of religious issues in First Amendment law. Whether in the public or private sphere, attracting local or national attention, the inconsistencies between First Amendment law and religion are pervasive. The First Amendment states that "Congress shall make no law" regarding the establishment of religion. Yet paradoxically, in an attempt to protect the free exercise of religion (which is also guaranteed by the First Amendment) exceptions have been made throughout American history. Finding a balance between these two clauses has proven difficult. In 2007, for example, in *Hein v. Freedom from Religion Foundation, Inc.*, the Supreme Court ruled that the government could allow religious services in its health facilities, prisons, and military bases provided the government does not *promote* them, which is a fine line to walk. In the same decision, the Court upheld the right of the Bush administration to support faith-based and community initiatives, and simultaneously eliminated the ability of a taxpayer to bring suit unless injury could be shown. In other words, the burden of proof established in this ruling is not only to illustrate that the First Amendment was violated, but to demonstrate a harm. This is difficult standard to meet and a troubling position for the Court to take. The readings of the cases in the previous chapters assist in tracking that standard through U.S. history and in finding possible resolutions to these conflicts.

As broadly outlined in Chapter One, from when its text first hit paper, the First Amendment has been controversial with regard to its religious clauses. Throughout this report, our goal has been to shed light on these controversies by interpreting landmark Supreme Court cases to create analyses that function as a social, political, and overall, intellectual accounts of one of the greatest Supreme Court conundrums.

Chapter Two addressed the religious implications for schools that are connected to a voucher system. One position argues that since public schools are available to all students, subsidizing private schools makes no sense. Moreover, since some private schools are funded by religious sects, releasing government funds through vouchers is a violation of the establishment clause. In fact, many Catholic schools might not have survived without voucher programs. The alternative to this argument is that vouchers guarantee freedom of choice, are not aimed at any single religion or private school, and therefore do not entwine the government in religion. Advocates on this side of the divide often argue that as our public schools decline, it is prejudicial not allow students the option of going to private schools. The public-private divide is compared to the old "separate but equal" system, which was separate but never equal, a loaded phrase both inside and outside of the classroom.

Chapter Three demonstrated that the Court has been the most accommodating when it comes to religious displays. The Supreme Court has ruled that, in certain circumstances, "acknowledging" religious representation is appropriate fine as long there is no direct promotion of religion. This line is one that the Court has had no problem walking. "Acknowledgment" has been defined in three ways: acknowledge of history, the right to reverence, and cultural recognition. Though generally agreeing on the first two definitions,

the Court has had more trouble with "cultural recognition." This vague phrase from Chief Justice Burger allowed the display of a cre'che in a city's Christmas display. In *Lynch v. Donnelly* (1984), the majority of the Court recognized acknowledgment of our religious heritage as a legitimate reason to protect the right of a community to erect a religious representation. In *Lynch*, the Court ruled that long standing religious holiday practices are protected. While concurring with the *Lynch* majority, Justice O'Connor defined the endorsement prohibition: "Endorsement sends a message to non-adherents that they are outsiders, not full members of the political community, and an accompanying message adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message."[1] More recently in Texas, the Court used this standard to uphold the right of Texas to display the Ten Commandments on its capital grounds, while ruling on the same day that Kentucky could not justify its display of the Commandments because they were not part of a historic acknowledgment or context. This chapter essentially challenges where one individual's rights begin and another individual's end. If I am driving down the I-5 into San Diego and see the cross on Soledad mountain to my right, do I feel like an outsider if I'm not a Christian? Or most importantly, is this an infringement of one of my rights or another individual exercising his or her's?

Chapter Four took on an entirely different issue, the right for members of the same sex to marry. Rulings in this area have evolved from decisions that overturned laws against interracial marriages and instances of intrusions into private lives. In *Lawrence v. Texas*, a major victory for gay rights, the Court overturned the ruling in *Bowers v. Hardwick*, a decision that had upheld a state's right to define homosexual activity as a crime.[2] States such as Vermont and Massachusetts were first to provide marriage benefits to same sex couples, and eventually California's Supreme Court interpreted its state constitution to guarantee equal rights to its citizens including the right to same sex marriages. The California ruling is un-appealable to the Supreme Court; however, voters in California were asked to amend their constitution by ballot proposition to re-define marriage as a bond between a man and woman.

The remaining chapters discussed free exercise and education. The first time the Court applied the religious clauses to the *states* was in *Everson v. Board of Education* in 1947, though other clauses of the First Amendment had been applied since 1925. More, important state precedents followed in the 1960s when school sponsored prayer[3] and Bible reading[4] were finally prohibited. In *Wallace v. Jaffree* in 1985, the Court struck down the moment of silence "for meditation or voluntary prayer." The Court has additionally ruled that intelligent design is merely code language for creationism, which makes it religious doctrine. Thus, public schools are not allowed to teach it and universities can preclude science teachers from teaching it.[5] On the other hand, in *Widmar v. Vincent*, students at a university in Kansas City challenged rule that no campus facilities could be used for religious purposes.[6] The students argued that their right to free speech trumped the anti-establishment clause.[7] By 8 to 1, the Court agreed with the students because the prohibition on religious use was a content based

[1] 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971)
[2] *Bowers v. Hardwick 478 U.S. 186* (1986); *Lawrence v. Texas* 539 U.S. 558 (2003)
[3]. *Engel v. Vitale,* 370 U.S. 421 (1962).
[4]. *School Dist. Of Abington Twp. v. Schempp,* 374 U.S. 203 (1963).
[5]. See *Edwards v. Aguillard*, 482 U.S. 578 (1987) which struck down the teaching of creationism in science classes.
[6]. 454 U.S. 263 (1981).
[7]. The Court took the same tact in *Rosenberg v. Rector and Visitors of the U. Of Virginia*, 515 U.S. 819 (1995).

speech prohibition. The rule was not content neutral, a well established standard in First Amendment law. If any speech was allowed in these facilities, then all legal speech, including religious speech had to be allowed.

Our has been to provide insight and understanding into the application of the First Amendment to religion. By examining the issues of the voucher system, religious displays, same sex marriage, free exercise, and religion inside of the classroom. The Center for First Amendment Studies has attempted to chart how the First Amendment's religious clauses have evolved. At the same time, we have sought to provide some sensible resolutions to each of the conflicts examined.