PENN STATE
LAW REVIEW

Moving Beyond Monkeys: The Expansion and Relocation of the Religious Curriculum Debate

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I. INTRODUCTION

> The forces of decay are ever-present in government because of man's sinfulness. The sin that destroys lives also destroys governments. . . . Human government is not only limited by the sin present in it, but that state may actually be destroyed by it, if evil is left unchecked.[1]

The sinful nature of humankind is not a danger often discussed in American government textbooks. In fact, such reflections are typically reserved for the pulpit. Nonetheless, at Calvary Chapel Christian School ("CCCS"), high school students are exposed to this language in their government book, they encounter Bible verses in their physics book,[2] and they use an American history textbook which claims "progressives had a faulty view of the nature of man."[3] As a routine administrative matter, the high school submitted the courses that use these texts to the University of California ("UC") for acceptance as college preparatory courses under the University's pre-college curricula policy for undergraduate admissions, called the "a-g" subject requirements because each letter represents one of the seven required high school subjects.[4]

1. Marla Jo Fisher, *Christian Themes Split UC, high schools*, ORANGE COUNTY REGISTER, Aug. 20, 2006, at 1, *available at* http://www.ocregister.com/ocregister/news/homepage/article_1249055.php (citing TIMOTHY KEESEE, AMERICAN GOVERNMENT FOR CHRISTIAN SCHOOLS (1999)).

2. *See id.* at 5.

3. *Id.* (citing TIMOTHY KEESEE & MARK SIDWELL, UNITED STATES HISTORY FOR CHRISTIAN SCHOOLS (3d ed. 2001)).

4. *See* University of California, "a-g" Subject Area Requirements, http://www.ucop.edu/a-gGuide/ag/a-g/welcome.html (last visited Nov. 30, 2009).

When UC reviewed CCCS' course syllabi under this policy, several courses were not approved.[5] UC's rejection of these classes has launched a notable new arena in the religious curriculum debate.

For the nearly eighty-five years since *Scopes v. State* (*Scopes Monkey Trial*),[6] the controversy over religious curriculum in the United States has been fueled by a single subject, biology, and the debate has largely addressed the content of public primary and secondary school curriculum.[7] However, as conservative Christian schools become increasingly prevalent in the United States,[8] and as universities create stringent curriculum requirements for college admission,[9] the focus of the debate is shifting to whether public universities should accept a whole host of private secondary school courses taught from a religious perspective as prerequisites to admission. In light of this development, Americans' love affair with the evolution and creationism debate must expand to include a wide variety of newcomers: history, government, physics, and literature to name a few.[10] As a country, we must now decide to what extent universities can, and should, create rigorous high school course requirements for college admission that may preclude the acceptance of some religion-themed courses.

As is so often the case with major policy issues, this decision will initially be made in the courts. The first test case of the issue, a constitutional challenge by CCCS and other plaintiffs to UC's pre-college curricula policy, is already wending its way through the judicial

5. *See* Complaint for Abridgment of Freedom of Speech, Freedom From Viewpoint Discrimination, Freedom of Religion & Ass'n, Freedom From Arbitrary Discretion, Equal Protection of the Laws, & Freedom From Hostility Toward Religion at 23-24, 28-29, 34-35, Ass'n of Christian Schs. Int'l v. Roman Stearns (C.D. Cal. Aug. 2005), *available at* http://www.universityofcalifornia.edu/news/acsi-stearns/ (follow "ACSI Complaint" hyperlink) [hereinafter Complaint].

6. Scopes v. State, 289 S.W. 363 (Tenn. 1927).

7. *See, e.g.*, Edwards v. Aguillard, 482 U.S. 578, 596-97 (1987); *Scopes*, 289 S.W. at 369-70.

8. The vast majority of conservative Christian schools have been founded in the last fifty years, and in 1993-1994, they constituted the second largest category of private schools with 4,664 schools, half of which belonged to the Association of Christian Schools International. *See* NAT'L CENTER FOR EDUC. STATISTICS, PRIVATE SCHOOLS IN THE U.S.: A STATISTICAL PROFILE, 1993-94 / OTHER RELIGIOUS CONSERVATIVE CHRISTIAN SCHOOLS 1 (1997), *available at* http://nces.ed.gov/pubs/ps/974 59ch3.asp.

9. Most public universities now require the completion of specific high school courses for admission. *See, e.g.*, University of Georgia, First Year Admission Criteria, http://www.admissions.uga.edu/article/first_year_admission_criteria.html (last visited Nov. 22, 2009); Penn State University, High School Course Requirements for 4-Year Degrees, http://admissions.psu.edu/academics/majors/4year/ (last visited Nov. 22, 2009); University of Washington, College Academic Distribution Requirements, http://admit.washington.edu/Requirements/Freshman/Core (last visited Nov. 22, 2009).

10. These CCCS courses were rejected by UC. *See* Fisher, *supra* note 1, at 1-2, 5.

system.[11] UC uses a particularly rigorous pre-college curricula policy that heightens the typical university curricula requirements to ensure an academically sound student body.[12] UC's policy requires that all California high schools submit syllabi to UC for approval under the "a-g subject requirements."[13] Importantly, California applicants who seek admission to UC may only count approved courses towards their required pre-college curricula courses.[14] When UC rejected the CCCS courses that are the subject of the lawsuit, the reviewers not only examined the course syllabi, but they also took the additional step of reviewing the courses' textbooks.[15] After this textbook review, some of the courses relying on conservative Christian texts published by Bob Jones University Press and A Beka Book were rejected.[16] One book in particular that concerned UC was a physics text that began each chapter with a Bible verse.[17] Republican Assemblywoman Sharon Runner, who organized a meeting between UC and some Christian schools, claimed the UC professors' only opposition to the physics book was the Bible

11. Ass'n of Christian Schs. Int'l v. Roman Stearns, No. 08-56320 (9th Cir. argued Dec. 7, 2009).

12. *See* University of California, a-g Subject Area Requirements, http://www.ucop.edu/a-gGuide/ag/a-g/welcome.html (last visited Nov. 24, 2009) (requiring that students complete a specified number of "a-g" courses in high school that have been individually approved by UC).

13. *See id.*

14. Although the University of California admits students in a variety of ways, the most oft-utilized method of admission for Californian high school applicants is the "statewide eligibility" process, which requires students to submit their grades and examination scores, but also requires evidence of completion of the "subject requirement." *See* University of California, Statewide Eligibility, http://www.universityofcalifornia.edu/admissions/undergrad_adm/paths_to_adm/freshman/state_eligibility.html (last visited Nov. 22, 2008). The "subject requirement" is most often satisfied through the submittal of fifteen pre-approved high school courses, though in the alternative, students may complete a SAT Subject Test with a sufficient score (and according to UC, scores in the bottom third have been approved). *See* Notice of Motion and Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(1) & (6); Memorandum of Points and Authorities in Support Thereof at 4, Ass'n of Christian Schs. Int'l v. Roman Stearns, No. CV 05-06242 SJO (RZx) (C.D. Cal. Dec. 12, 2005), *available at* http://www.universityofcalifornia.edu/news/acsi-stearns/ (follow "UC Motion to Dismiss" hyperlink).

15. *See* Fisher, *supra* note 1, at 1.

16. *See* Complaint, *supra* note 5, at 22, 28. It should be noted that although CCCS claims the courses were rejected for their Christian perspective, forty-three CCCS courses have been approved. *See id.*; Trounson, *infra* note 29, at A-1. Moreover, subsequent to the apparent initial disapproval of Bob Jones University physics and chemistry texts, these textbooks have now been approved by UC for use in future science courses as long as the courses otherwise meets the a-g laboratory science guidelines. *See* University of California, (d) Laboratory Science, http://www.ucop.edu/a-gGuide/ag/a-g/science_reqs.html (last visited Dec. 11, 2009).

17. *See* Fisher, *supra* note 1, at 5.

verses.[18] On the other hand, UC claimed the concern was over the "quality and accuracy" of the scientific content.[19]

In response to the course rejections, the Association of Christian Schools International ("ACSI"), along with CCCS and six students, brought suit against UC in *A.C.S.I. v. Stearns,*[20] alleging the "a-g" requirement is unconstitutional under the Free Speech Clause, the Religion Clauses, and the Equal Protection Clause.[21] Plaintiffs claim that because of the multiple course disapprovals, it is more difficult for students in Christian schools to gain admission to the UC institutions.[22] The District Court for the Central District of California granted the University's Motion for Summary Judgment, and the case is now on appeal to the Ninth Circuit.[23]

This Comment addresses the extent to which public universities may strengthen their high school course requirements for admission without violating the constitutional rights of religious high school applicants. The Comment begins with the provision of background information on the status of American education, the legal and social precedent behind this educational movement, and pre-college curricula policies' susceptibility to constitutional challenges. Next, the constitutionality of pre-college curricula policies will be examined under the Free Speech Clause, Religion Clauses, and Equal Protection Clause. The test case *A.C.S.I. v. Stearns* will also be briefly discussed. Lastly, the public policy considerations will be examined, and a suggested resolution will be proffered.

18. *See id.*

19. *See id.*

20. Order Granting Defendants' "Motion for Summary Judgment on Plaintiffs' As-Applied Claims" at 20, Ass'n of Christian Schs. Int'l v. Roman Stearns, No. CV 05-06242 SJO (MANx) (C.D. Cal. Aug. 8, 2008), *available at* http://www.universityofcalifornia.edu/news/acsi-stearns/ (follow "Order Granting Defendants' Motion for Summary Judgment" hyperlink) [hereinafter Second Summary Judgment].

21. *See* Complaint, *supra* note 5, at 39-64.

22. At the time of the lawsuit, no CCCS student had been rejected by UC for the actions alleged in the Complaint. *See* Order Denying Plaintiffs' Motion for Summary Judgment and Granting Defendants' Motion for Partial Summary Judgment at 2 n.3, Ass'n of Christian Schs. Int'l v. Roman Stearns, No. CV 05-6242 SJO (MANx) (C.D. Cal. Mar. 28, 2008), *available at* http://www.universityofcalifornia.edu/news/acsi-stearns/ (follow "Order Denying Plaintiffs' Motion for Summary Judgment and Granting Defendants' Motion for Partial Summary Judgment" hyperlink) [hereinafter First Summary Judgment]; Complaint, *supra* note 5, at 39-64.

23. The case was argued before the Ninth Circuit on December 7, 2009, and the parties are currently awaiting a decision. Ass'n of Christian Schs. Int'l v. Roman Stearns, No. 08-56320 (9th Cir. argued Dec. 7, 2009).

II. BACKGROUND

A. *The Status of Education in the United States*

In 1983, amidst the anxieties of the Cold War, a newly formed government commission made the dire determination that America is a "nation at risk."[24] Surprisingly, the drafters of the report by that name were not experts in foreign policy, national security, or weaponry; rather, the resolute writers were educators. Armed with the fruits of nearly two years of data collection, the National Commission on Excellence in Education ("NCEE") unabashedly advised the Secretary of Education: "If an unfriendly foreign power had attempted to impose on America the mediocre educational performance that exists today, we might well have viewed it as an act of war."[25]

Unfortunately, American educators today still grapple with many of the same fundamental inadequacies that prompted the NCEE to make such a bold pronouncement twenty-five years ago.[26] Since the NCEE report was released, politicians and educators have failed to find solutions to familiar education inadequacies noted in the report, such as faltering math and science performance.[27] In an increasingly global economy, America must quickly find solutions to these issues, or else face diminished economic power due to the lessened value of our workers. Within this context, it is both proper and advisable for higher education institutions to use their admissions policies as vehicles of reform toward the related goals of increasing the caliber of collegiate student bodies and encouraging secondary education institutions to produce better-prepared graduates. However, when universities strengthen their admission requirements with mandatory high school curricula, the change makes universities vulnerable to heretofore-unseen constitutional challenges.[28]

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24. NAT'L COMM'N ON EXCELLENCE IN EDUC., A NATION AT RISK 1 (1983), *available at* http://www.ed.gov/pubs/NatAtRisk/risk.html.

25. *Id.*

26. See *id.* at 1-2 (*see* "Findings Regarding Expectations" and "Findings Regarding Teaching," discussing, among other things, low teacher salaries, inadequate math and science education, and a lack of foreign language education); Dan Lips, *Still 'a Nation at Risk,'* THE MONITOR, May 2, 2008, http://www.heritage.org/Press/Commentary/ed05608g.cfm.

27. *See* Sam Dillon, *Study Compares States' Math and Science Scores With Other Countries'*, N.Y. TIMES, Nov. 14, 2007, at A21; THOMAS B. FORDHAM INST., EDUCATION OLYMPICS: THE GAMES IN REVIEW 4 (2008), *available at* http://epicpolicy.org/thinktank/review-education-olympics (follow "Education Olympics 2008: The Games in Review" hyperlink).

28. *See infra* part III.

B. The Legal and Social Precedent

The issue of whether course requirements in higher education admissions discriminate against religious high school students is a novel one.[29] To date, religious constitutional challenges in the area of education have largely focused on issues of public funding for allegedly religious activities.[30] Alternately, higher education admissions challenges under the Constitution are often based on considerations of race or gender.[31] The issue at bar combines both of these familiar education law issues, blending the battle between church and state with the equally controversial battle over allegedly discriminatory admissions procedures.

Given the current educational trends, this battle has the potential to escalate into full-blown warfare. First, the number of conservative Christian schools has dramatically increased over the last fifty years.[32] Coupled with this boom, universities now frequently require that prospective students complete a number of "college preparatory" courses in high school that differ from the state high school graduation requirements.[33] Universities will likely continue to utilize these high school course policies, and may look for ways to gather even more course information under the policies, because research shows that the

29. *See* Rebecca Trounson, *Rights Clash In Bias Suit Against UC*, L.A. TIMES, Dec. 19, 2005, at A-1.

30. *See, e.g.*, Witters v. Wash. Dep't of Services for the Blind, 474 U.S. 481 (1986); Sheldon Jackson Coll. v. State, 599 P.2d 127 (Alaska 1979).

31. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 309 (2003); Gratz v. Bollinger, 539 U.S. 244, 256 (2003); Johnson v. Bd. of Regents of Univ. of Ga., 106 F. Supp. 2d 1362 (S.D. Ga. 2000); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 299 (1978); Michael Olivas, *Constitutional Criteria: The Social Science And Common Law of Admissions Decisions in Higher Education*, 68 U. COLO. L. REV. 1065, 1090 (1997).

32. *See* NAT'L CENTER FOR EDUC. STATISTICS, *supra* note 8.

33. *See, e.g.*, University of Kentucky, Undergraduate Admissions, *available at* http://www.uky.edu/Admission/homefroshapply.htm (follow "The Pre-College Curriculum" hyperlink) (requiring four credits of English, three credits of math, three credits of science, three credits of social science, two credits of foreign language, one credit of history of a visual or performing art, a half credit of health, and a half credit of physical education); *cf.* Minimum Requirements for High School Graduation, 704 KAR 3:305 (Feb. 1, 2006) *available at* http://www.education.ky.gov/kde/instructional+resources/high+school/refocusing+secondary/high+school+graduation+requirements.htm (follow "704 KAR 3:305 Regulation" hyperlinks) (outlining the Kentucky high school graduation requirements, which differ from the University of Kentucky's admission requirements in that they do not require the completion of a foreign language); University of Florida, Qualifying for Admission, http://www.admissions.ufl.edu/ugrad/fr qualify.html (last visited Nov. 30, 2009) (requiring four credits of English, three credits of math, three credits of science, three credits of social science, and two credits of foreign language); *cf.* FLA. STAT. ANN. § 1003.43 (2009) (outlining the Florida high school graduation requirements, which are largely dissimilar from the University of Florida's admission requirements).

rigor of a college applicant's high school course work is one of the best indicators of his or her collegiate success.[34]

C. *University Pre-College Curricula Policies and their Vulnerability to Constitutional Challenges*

Although most universities do not review syllabi like UC does, many university pre-college curricula policies are already vulnerable to litigation. Most policies require that applicants prove they have completed a specific number of credits in English, math, science, social science, and a foreign language, and some policies additionally require a course in a visual or performance art.[35] The methods of enforcement for these policies vary, but most universities use high school transcripts to verify that applicants have completed the proper courses, even when the applications instruct applicants to self-report the courses that satisfy the requirements.[36] Any method of enforcement is susceptible to constitutional challenges because all pre-college curricula policies involve content-based decisions about which courses satisfy the requirements. These subjective decisions are fraught with constitutional problems because they depart from the more objective measures of grades and test scores.

All policies will force admissions reviewers to draw distinctions between courses in order to determine which courses fulfill specific subject requirements. Some policies have built-in distinctions among categories of courses, and these policies are arguably more susceptible to challenge due to their overt rejection of particular kinds of courses. For

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34. *See, e.g.*, MICHAEL KIRST, EXPERT REPORT OF MICHAEL KIRST 1 (2007), *available at* http://www.universityofcalifornia.edu/news/acsi-stearns/. *See* Philip M. Sadler & Robert H. Tai, *Accounting for Advanced High School Coursework in College Admission Decisions*, 82 COLL. & UNIV. J. 7, 12 (2007) (finding that "two variables were found to correspond to substantially better performance in college science courses: increasing rigor of high school science experience and higher grades in high school science courses.").

35. *See, e.g.*, University of Oregon, Freshman Admission Information, http://admissions.uoregon.edu/freshmen/requirements (last visited Dec. 8, 2009) (requiring courses in English, math, science, social science, and a foreign language); University of Michigan, Requirements, http://www.admissions.umich.edu/prospective/prospectivefreshmen/requirements.php (last visited Dec. 8, 2009) (requiring courses in English, math, science, social science, and a foreign language); Ohio State University, Admission Criteria for Domestic Freshmen, http://undergrad.osu.edu/FreshAdmissioncriteria.html (last visited Dec. 8, 2009) (requiring courses in English, math, science, social science, a foreign language, and a visual or performing art).

36. *See, e.g.*, University of Oregon, 2010-11 Admission Applications for the University of Oregon and The Clark Honors College, http://admissions.uoregon.edu/apply/pdf/2010-11UGAPPF.pdf (instructing applicants to report the courses that fulfill the pre-college curricular, but noting that the reported information will be verified upon receipt of the applicants' transcripts).

example, a policy that explicitly precludes the acceptance of religion courses, like the University of Washington's social studies requirement,[37] is particularly vulnerable to challenges by religious high schools. Furthermore, the University of Washington's English requirement allows public speaking courses, but disallows acting courses; allows journalistic writing, but disallows newspaper staff courses; allows business English, but not basic English skills.[38] Such detailed requirements are bound to cause discrepancies over which courses fit into which categories, and the inevitable course rejections may trigger lawsuits over perceived discrimination.

Even without such explicit distinctions, curricula policies will periodically compel reviewers to make difficult decisions about courses when course names do not perfectly fit within one subject area. For instance, a Christian high school applicant may try to categorize a course entitled "Christian Biology" as a "lab science." When a reviewer sees a course called "Christian Biology" on a transcript, he or she may wonder whether the course is more similar to a religion course or to a science course. If there is concern about the category of the course, the university might investigate the content of the course, and this inquiry may lead to the rejection of the course as a pre-college curricula credit, thereby leaving the university susceptible to suit on the grounds that the rejection was discriminatory, or that their policy is unconstitutional. Therefore, even if most universities do not categorically exclude certain courses or begin to require individual approval of course syllabi, the typical pre-college curricula policies are already ripe for constitutional challenges.

These potential claims of discrimination were first brought to light by religious high school students, but universities are also vulnerable to claims of discrimination by racial minority students, homeschooled students, or charter school students. For example, public school courses are regularly rejected by UC, and one study shows that racial minorities in California are less likely than other students to satisfy the a-g requirements due to a lack of approved courses at schools with high percentages of minority students.[39] Additionally, homeschooled students

37. The University of Washington specifically states on its admissions website that religion courses will not count towards its social science prerequisite for admission. University of Washington, Social Science, http://admit.washington.edu/Requirements/Freshman/CorePDF (last visited Nov. 23, 2009).

38. *See* University of Washington, Requirements & Policies: Freshman, http://admit.washington.edu/Requirements/Freshman/Core/English (last visited Nov. 22, 2009).

39. *See* UNIV. OF CAL. ALL CAMPUS CONSORTIUM FOR RESEARCH DIVERSITY & U.C.L.A. INST. FOR DEMOCRACY, EDUC. AND ACCESS, REMOVING THE ROADBLOCKS: FAIR COLLEGE OPPORTUNITIES FOR ALL CALIFORNIA STUDENTS 4-5 (2006), *available at*

are particularly likely to feel that they have been subjected to discriminatory admission practices because many schools already publish separate, more stringent admission policies for these students to ensure that they are prepared for college.[40] Moreover, from a practical standpoint, homeschools and other non-traditional high schools such as charter schools, simply may not offer the courses required by a stringent admissions policy. If significant numbers of students from these schools are rejected by the public universities in their state due to the students' inability to fulfill the pre-college course requirements, the schools will have potential claims under the Free Speech and Equal Protection clauses because the universities would be indirectly pressuring the schools to conform the content of their private instruction to the universities' mandates, and the universities would be treating a class of students differently from other students. Although the potential claims of racial minorities, homeschooled students, and charter school students will not be analyzed herein, it is clear that *A.C.S.I. v. Stearns* is an important "harbinger for admissions policies at state universities nationally,"[41] for multiple categories of high school students.

III. THE CONSTITUTIONALITY OF UNIVERSITY PRE-COLLEGE CURRICULA POLICIES

The constitutionality of pre-college curricula policies will be analyzed under the most probable sources of claims: the Free Speech Clause, the Religion Clauses, and the Equal Protection Clause. While the constitutionality of any given policy depends in part upon the specific details of the policy, many general conclusions may be drawn from the inherent traits all policies share. Moreover, throughout this section, specific aspects of policies that some universities currently use, or that universities might consider using in the future, will be analyzed as they become particularly relevant under each constitutional clause.

idea.gseis.ucla.edu/publications/files/RR-ExecutiveSummary.pdf [hereinafter ROADBLOCKS].

40. *See, e.g.*, Penn State University, Homeschool Requirements, http://admissions.psu.edu/academics/majors/requirements/homeschool/ (last visited Nov. 22, 2009) (requiring from homeschooled applicants: "detailed documentation of their high school coursework and evaluations of progress from an approved homeschool evaluator or supervisor"); University of Georgia, Home Educated Or Non Accredited High School, http://www.admissions.uga.edu/article/home_educated_or_non_accredited_high_school.html (last visited Nov. 22, 2009) (outlining the special admission requirements for homeschooled applicants); University of Washington, Homeschooled Applicants, http://admit.washington.edu/Requirements/Freshman/Homeschool (last visited Nov. 22, 2009) (outlining the special admission requirements for homeschooled applicants).

41. Carolyn Marshall, *University Is Accused of Bias Against Christian Schools*, N.Y. TIMES, Nov. 20, 2005, at 124.

A. *Free Speech*

One of the most prominent features of the Bill of Rights is the Free Speech Clause of the First Amendment, which commands: "Congress shall make no law . . . abridging the freedom of speech."[42] From this provision, courts have extracted the general rule that the government may not restrict expressive behavior on the basis of its content.[43] However, the extensive free speech jurisprudence has muddied the waters by introducing numerous constitutionality tests for speech, dependent upon the variety of speech and the regulation at issue. The challenges and accompanying tests that are most applicable to pre-college curricula policies are discussed below, grouped into facial challenges and as-applied challenges.

1. Facial Challenges

Facial challenges, which challenge the text of laws in any and all factual circumstances,[44] have been labeled as a "last resort," and succeed only when the plaintiffs show "a substantial risk that application of the provision will lead to the suppression of speech."[45] If the text of a course requirement policy mandated the content of high school courses, or categorically excluded all courses taught from a religious perspective, the policy could be deemed facially unconstitutional on the basis of viewpoint discrimination. Barring such extreme policies though, course requirements are likely to be facially constitutional, unless they run afoul of the vagueness or overbreadth doctrines.[46] Accordingly, these two facial challenges are explored below.

The vagueness standard was perhaps most simply expressed in 1926 by the Supreme Court, which concisely opined that a law is overly vague when citizens "of common intelligence must necessarily guess at its meaning."[47] Ironically, this vagueness standard is itself guilty of much ambiguity. However, the multifarious applications of the vagueness standard need not be discussed here because the Supreme Court held in *National Endowment for the Arts v. Finley*[48] that "when the Government

42. U.S. CONST. amend. I.

43. *See, e.g.*, R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 382 (1992).

44. *See* Webster v. Reprod. Health Servs., 492 U.S. 490, 524 (1989) (noting that the facial "challenger must establish that no set of circumstances exists under which the Act would be valid.").

45. Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 580 (1998).

46. Indeed, the plaintiffs in *A.C.S.I. v. Stearns* argued that UC's admissions standards facially violate the Free Speech Clause because they are vague, and they also challenged the policy under the overbreadth doctrine. *See* Complaint, *supra* note 5, at 59.

47. Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926).

48. Nat'l Endowment for the Arts v. Finley, 524 U.S. 569 (1998).

is acting as a patron rather than as a sovereign, the consequences of imprecision are not constitutionally severe."[49] Due to this deferential standard for the "patron" government, it is now highly unlikely any plaintiffs will succeed in vagueness challenges to university admissions policies because when a university is bestowing grants of admission, it is acting as a patron rather than as a sovereign.

In contrast, the overbreadth doctrine holds that government regulation of free speech is overbroad "if it sweeps within its ambit a substantial amount of protected speech along with that which it may legitimately regulate,"[50] and the regulation impinges on the First Amendment rights of third parties.[51] Although vagueness and overbreadth challenges are often argued simultaneously, they are not mutually exclusive.[52] Thus, it is conceivable that a vagueness challenge could be stricken while an overbreadth challenge succeeds. However, it is unlikely that pre-college curricula policies are overbroad because they only target one narrow kind of speech: high school classroom instruction. Furthermore, because universities' unique "mission is education," they are given more leeway to regulate within that important mission, and thus should be less susceptible to the already rare facial invalidations.[53]

2. As-Applied Challenges

a. Viewpoint Discrimination

The strongest free speech argument against a facially valid pre-college curricula policy is viewpoint discrimination. In order to determine whether a given policy constitutes unconstitutional viewpoint discrimination, a court must first make a series of initial findings about the variety of speech and the variety of regulation at issue because different kinds of speech and regulations are subject to different degrees of scrutiny. In this case, the first threshold finding is whether

49. *Id.* at 589.

50. Doe v. Univ. of Mich., 721 F. Supp. 852, 864 (E.D. Mich. 1989) (internal citations omitted).

51. *See* City Council v. Taxpayers for Vincent, 466 U.S. 789, 800-01 (1984) (noting: "[T]he mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge . . . there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court . . . .)" (internal citations omitted).

52. *See* Bd. of Airport Comm'rs of L.A. v. Jews for Jesus, Inc., 482 U.S. 572, 574-77 (1987) (holding that a law prohibiting free speech in an area of the Los Angeles International Airport is overbroad, but not vague, though the law was challenged on both grounds).

53. Widmar v. Vincent, 454 U.S. 263, 274 n.5 (1981) (noting that universities can make "reasonable" regulations within their mission of education).

educational instruction is protected speech, and if so, whether pre-college curricula policies somehow impinge on that speech. Of course, if either of these findings are negative, the regulation is constitutional under the Free Speech clause.

If the speech is protected and the regulation threatens the speech though, it must be determined whether the regulation is content-based or content-neutral. If the regulation is content-neutral, it is tested under the O'Brien framework.[54] This framework renders a regulation constitutional if it is within the government's constitutional authority, the regulation advances an "important or substantial government interest," the government interest is unrelated to the restriction on speech, and the "incidental restriction" is narrowly tailored to the government interest.[55] If, on the other hand, the regulation is content-based, it must next be determined whether the speech is government speech because the government may make content-based restrictions on government speech.[56] If the regulation is content-based and the speech is non-governmental speech though, it must be determined whether the government is regulating the speech as a patron, and must make content-based decisions about private speech to fulfill its government mandate to bestow certain benefits to the public. When the government is acting according to this kind of mandate, it may make content-based decisions about private speech, but it may not discriminate on the basis of viewpoint.[57] If the government is not acting according to this mandate though, and is imposing a content-based regulation on non-governmental

54. *See* City of Erie v. Pap's A.M., 529 U.S. 277, 290 (2000) (applying the four part O'Brien test to a general prohibition of conduct because it is content-neutral); United States v. O'Brien, 391 U.S. 367, 377 (1968) (outlining a four-part test for content-neutral speech).

55. *See Pap's A.M.*, 529 U.S. at 290 (applying the four part O'Brien test to a general prohibition of conduct because it is content-neutral); *O'Brien*, 391 U.S. at 377 (outlining a four-part test for content-neutral speech).

56. *See* Davenport v. Wash. Educ. Ass'n, 127 S.Ct. 2372, 2381 (2007); Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994); *see also* Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 833-34 (1995) (noting that when the government is the speaker, it may make content-based regulations).

57. *See* United States v. Am. Library Ass'n, Inc., 539 U.S. 194, 205 (2004) (holding that a law that conditions public library funds on the installation of an internet filter that precludes access to sites with obscenity or child pornography is a permissible content-based choice because "[p]ublic library staffs necessarily consider content in making collection decisions and enjoy broad discretion in making them."); Ark. Ed. Television Comm'n v. Forbes, 523 U.S. 666, 683 (1998) (holding that a public television station may make reasonable decisions based on content when determining their programming); Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 572-73 (1998) (holding that subjective grant criteria, such as the desire for "artistic excellence," are constitutional); Bd. of Educ. v. Pico, 457 U.S. 853, 866-67, 870-71 (1982) (holding that students have a First Amendment right to receive information and that, while the school must make content-based decisions, it cannot make the decisions based on viewpoint discrimination).

speech, the regulation must be examined under the strict scrutiny review.[58] Each of these alternative findings are applied to pre-college curricula policies in turn below.

i. Protected Speech

Instruction in the classroom is protected speech because it falls under the category of "school-sponsored speech."[59] In fact, this type of speech is entitled to special protection because of the school setting.[60] Universities will likely claim that because their policies do not directly regulate the content of courses, but rather only indirectly affect classroom speech by incentivizing certain kinds of instruction, the universities are not subject to Free Speech claims. However, even when the government merely applies intense pressure to conform to its requirements, First Amendment analysis is required.[61] Therefore, any policy which incentivizes certain kinds of high school instruction is vulnerable to Free Speech challenges.

ii. Content-Based vs. Content-Neutral Regulations

If speech is both protected and interfered with by a government regulation, the regulation must next be labeled as either content-based or content-neutral. The distinction between content-based and content-neutral regulations is an important one because the determination dictates the appropriate level of judicial scrutiny.[62] Content-based laws are presumed unconstitutional and typically warrant strict scrutiny, whereas content-neutral laws are not analyzed under this heightened standard of

58. *See, e.g.*, R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 382 (1992) (noting that content-based regulations are generally subject to strict scrutiny).

59. *See, e.g.*, Axson-Flynn v. Johnson, 356 F.3d 1277, 1286 (10th Cir. 2004) (noting that "School-sponsored speech comprises 'expressive activities' that 'may fairly be characterized as part of the school curriculum. . . .'").

60. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) (holding that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.").

61. In *Bantam Books, Inc. v. Sullivan*, the Rhode Island Commission to Encourage Morality in Youth identified books they found inappropriate for children, and then notified the publisher and the police. *See* Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 61-63 (1963). In undertaking a First Amendment analysis, the Court noted that "though the Commission is limited to informal sanctions . . . the record amply demonstrates that the Commission deliberately set about to achieve the suppression of publications deemed 'objectionable' and succeeded in its aim." *Id.* at 67.

62. *See* City of Ladue v. Gilleo, 512 U.S. 43, 59 (1994) (O'Connor, J., concurring) ("The normal inquiry that our doctrine dictates is, first, to determine whether a regulation is content based or content neutral, and then, based on the answer to that question, to apply the proper level of scrutiny.").

judicial review.[63] Whether or not a pre-college curricula policy is content-based is debatable; however, it is more likely, and one can assume for the sake of analysis, that these kinds of admission policies are content-based regulations because they favor some high school courses over others, based on the subject matter and content of the course.[64] In spite of this presumed characterization, the policies are not necessarily subject to strict scrutiny as content-based regulations because recent case law has relaxed the standard when the speaker is the government, and when the government is bestowing benefits with its regulations, instead of restricting conduct.[65] Therefore, a finding on these two issues must be made before the appropriate level of judicial scrutiny becomes clear.

iii. Government Speech

The government speech doctrine is a new one;[66] however, it is important to determine whether the speaker at issue is the government because if the government is regulating its own speech, it may regulate the speech more freely.[67] On the other hand, if private citizens' speech is being restricted, the government has significantly less leeway to regulate. The Fourth, Eighth, and Tenth Circuits recently adopted a four part test to determine whether an expression is government speech.[68] This test examines:

63. *See* Davenport v. Wash. Educ. Ass'n, 127 S. Ct. 2372, 2381 (2007); *Turner*, 512 U.S. at 642.

64. "[L]aws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content-based." Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 643 (1994). If a court instead finds that admission policies requiring specific prior coursework are content-neutral, which is unlikely, the O'Brien framework would be applied to determine its constitutionality under the free speech clause. *See* United States v. O'Brien, 391 U.S. 367, 377 (1968) (outlining a four-part test for content-neutral speech); City of Erie v. Pap's A.M., 529 U.S. 277, 290 (2000) (applying the four part O'Brien test to a general prohibition of conduct because it is content-neutral). However, this analysis will not be conducted here because it is unlikely this type of restriction would be deemed content-neutral.

65. *See, e.g.*, Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 833-34 (1995) (noting that the government may restrict speech further when it is restricting itself); *Davenport*, 127 S. Ct. at 2381 (holding that strict scrutiny is not needed in a few recognized situations, one of which is when "the risk that content-based distinctions will impermissibly interfere with the marketplace of ideas is . . . attenuated," which is the case "when the government acts in a capacity other than as regulator.").

66. *See* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 574 (2005) ("The government-speech doctrine is relatively new. . . .").

67. *See Rosenberger*, 515 U.S. at 833-34 (noting that when the state is speaking, it may make content-based decisions).

68. *See, e.g.*, Sons of Confederate Veterans, Inc. *ex rel*. Griffin v. Comm'r of the Va. Dep't of Motor Vehicles, 288 F.3d 610, 618 (4th Cir. 2002); Knights of the Ku Klux Klan v. Curators of the Univ. of Mo., 203 F.3d 1085 (8th Cir. 2000); Wells v. City and County of Denver, 257 F.3d 1132, 1141 (10th Cir.).

> (1) the central "purpose" of the program in which the speech in question occurs; (2) the degree of "editorial control" exercised by the government or private entities over the content of the speech; (3) the identity of the "literal speaker"; and (4) whether the government or the private entity bears the "ultimate responsibility" for the content of the speech, in analyzing circumstances where both government and a private entity are claimed to be speaking.[69]

Since the promulgation of this test in the circuit courts, the Supreme Court has specifically ruled on the issue, and in that 2005 opinion, the Court failed to reference the test.[70] The Court held that the government-subsidized beef checkoff program, which forces beef producers to assess a fee on beef to contribute to generic beef advertising, is constitutional government speech.[71] The rationale was that the speech is constitutional because the government created the program and exercises significant control over it, even though some private parties are utilized in spreading this government message.[72] Since this case, the Sixth Circuit has hinted that the Supreme Court's creation and control test rendered the four part test irrelevant, but the Ninth Circuit disagrees and continues to use the four part test, informed by the Supreme Court's creation and control test, as does the District Court for the Western District of Pennsylvania.[73]

In sum, it is uncertain whether the four part test is still relevant, but there is some authority for the use of both the four part test and the creation and control test when determining whether the government is speaking. In applying these tests to the speech at hand, it becomes clear that the government is regulating government speech when public universities review public high school courses for their compliance with admissions standards, but the government is regulating private speech when public universities review private high school courses.

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69. *Sons of Confederate Veterans*, 288 F.3d at 618.

70. *See generally*, *Johanns*, 544 U.S. 550 (holding that the government subsidized beef checkoff program, which forces beef producers to contribute to generic beef advertisements, is constitutional government speech).

71. *See id.* at 566-67.

72. *See id.* at 563 (hereinafter referred to as the "creation and control test").

73. Am. Civil Liberties Union of Tenn. v. Bredesen, 441 F.3d 370, 380 (6th Cir. 2006) (rejecting the reasoning of an opinion because it used the four part test for government speech instead of the Supreme Court's subsequent creation and control test); Ariz. Life Coal. Inc. v. Stanton, 515 F.3d 956, 965 (9th Cir. 2008) (utilizing both the four part test and the Supreme Court's creation and control test to decide whether the speech expressed through Arizona's license plate program is government speech); Pittsburgh League of Young Voters Educ. Fund v. Port Auth. of Allegheny County, 2008 WL 4965855 at *9 (W.D. Pa. 2008) (agreeing with the 9th Circuit that both the four part test and the creation and control test are informative when determining whether speech is government speech).

When the university regulations are applied to public high schools, the speaker is a publicly paid teacher who is following a curriculum that is designed and controlled by the government. Therefore, the speech is government speech. The categorization has specific implications:

> [W]hen the State is the speaker, it may make content-based choices. When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message. . . . When the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee.[74]

This valuable language from *Rosenberger v. Rector and Visitors of University of Virginia*[75] creates the distinction between government speech and forum cases. According to the Court, a university may regulate content when it is spreading its own message, or when it "enlists private entities" to do the same, but it cannot open a forum inviting diverse views from other parties and then regulate the content.[76] The forum cases are inapplicable to the issue at hand.[77] Therefore, when the

74. Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 833-34 (1995) (internal citations omitted) (discussing the quote in *Widmar v. Vincent*: "Nor do we question the right of the University to make academic judgments as to how best to allocate scarce resources." Widmar v. Vincent, 454 U.S. 263, 276 (1981).).

75. Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995).

76. *Id.* at 833-34.

77. *National Endowment for the Arts v. Finley* determined that the NEA grant procedure is distinguishable from the forum cases because of its "competitive process." Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 586-87 (1998). Similarly, any course requirement in an admission policy is created to aid in the very competitive process for entry into the university. Moreover, in *United States v. American Library Association, Inc.*, the Court found that although there are some untraditional forums, the Internet at issue in public libraries was not a forum:

> A public library does not acquire Internet terminals in order to create a public forum for Web publishers to express themselves, any more than it collects books in order to provide a public forum for the authors of books to speak. It provides Internet access, not to 'encourage a diversity of views from private speakers,' but for the same reasons it offers other library resources: to facilitate research, learning, and recreational pursuits by furnishing materials of requisite and appropriate quality.

United States v. Am. Library Ass'n, Inc., 539 U.S. 194, 602 (2004). Like the library Internet, a course reviewing board is not a forum because it solicits syllabi not to "encourage a diversity of views," but to promote excellence in education. *Id.* Finally, and perhaps most convincingly here, in *Library*, the Court recounted its decision not to apply forum law in *Finley*, and it explained that the forum analysis would have been contrary to the "inherently content-based 'excellence' threshold." *Id.* at 205. Thus, because college admissions procedures are based on a similar excellence criterion, the forum framework should not apply.

university pre-college curricula policies are applied to public high school speech, the government is regulating its own speech, and it may make content-based distinctions among the high school course instruction it regulates.[78]

On the other hand, when the university regulations are applied to private high school teachers, this classroom instruction cannot be deemed government speech because the speech is not part of a government program, it is not controlled by the government in any way, it has no governmental purpose, and the literal speaker is a private citizen who is not paid with tax dollars. Therefore, this content-based restriction on private speech would typically be subject to strict scrutiny review. However, there is one final finding that must be made before the appropriate level of scrutiny for this speech is revealed.

iv. The Patron Government

The final threshold determination is whether the government is acting as a patron, and is making content-based decisions about the benefits it is bestowing in order to carry out the mandate of a government program. Recent cases have held that when the government must make decisions about the bestowment of certain government benefits, it need not meet strict scrutiny and may use the content of speech to make its decisions, but perhaps only as long as minority viewpoints are not stifled.[79] The Supreme Court has found that a number of factual scenarios fall within this necessarily content-based decisions category, such as libraries' decisions about the content of the material they provide, public television stations' decisions about the content of their

78. There is some judicial confusion regarding whether government speech can merely be content-based, or whether it can also actually discriminate on the basis of viewpoint. The *Rosenberger* Court seemed to take the former position because it held that the government may make "content-based choices" when it is speaking. *See Rosenberger*, 515 U.S. at 833. However, the Fourth Circuit has interpreted this language from *Rosenberger* to mean that government speech may discriminate on the basis of viewpoint. *See, e.g.*, Planned Parenthood of S.C., Inc. v. Rose, 361 F.3d 786 (4th Cir. 2004). On the other hand, the Fourth Circuit's confident interpretation may not be correct because Justice Scalia recently wrote that when the government makes content-based decisions, it "can exclude speakers based on reasonable, viewpoint-neutral subject-matter grounds." Davenport v. Wash. Educ. Ass'n, 127 S.Ct. 2372, 2381 (2007). Therefore, it seems likely that the government may not make viewpoint-based decisions in its own speech, in spite of the Fourth Circuit's holding otherwise.

79. *See Library*, 539 U.S. at 205 (noting that "heightened judicial scrutiny" is "incompatible with the discretion that public libraries must have to fulfill their traditional missions."); *Finley*, 524 U.S. at 587, 589-90 (finding a necessarily content-based regulation facially constitutional and suggesting that a regulation which involves a necessarily content-based decision would only be unconstitutional as-applied if it "raises concern about the suppression of disfavored viewpoints.").

broadcasts, the National Endowment for the Arts' decisions about the recipients of art grants, and, perhaps most importantly, schools' decisions about which books to remove from their school library.[80]

Any admission policy is very comparable to the necessarily content-based government regulation cases, especially the competition for art grants in *National Endowment for the Arts v. Finley*, because the university is bestowing a benefit, admission, and it must make content-based decisions about the students that apply for that benefit. It should be noted though that the university admissions process is potentially distinguishable from this line of cases because in all of these cases, with the possible exception of *Finley*, the necessarily content-based decisions concern which private speech to make available to the public. University admissions policies are not choosing which private speech to distribute, but rather, are choosing which private speech to approve as consistent with their government-funded education program. The university pre-college curricula policies are further distinguishable because unlike the government programs at issue in the necessarily content-based cases, decisions about high school courses are not technically necessary to carry out the universities' government mandate of improving higher education in this country.[81] After all, some pre-college curricula policies simply mimic, or closely mimic, the state high school graduation requirements, and therefore essentially require a mere diploma from any accredited high school.[82]

80. *See Library*, 539 U.S. at 199, 214, 205 (holding that a law that conditions public library funds on the installation of an Internet filter that precludes access to sites with obscenity or child pornography is a permissible content-based choice because "Public library staffs necessarily consider content in making collection decisions and enjoy broad discretion in making them."); Ark. Ed. Television Comm'n v. Forbes, 523 U.S. 666, 683 (1998) (holding that a public television station may make reasonable decisions based on content when determining their programming); *Finley*, 524 U.S. at 572-73 (holding that subjective grant criteria, such as the desire for "artistic excellence," are constitutional); Bd. of Educ. v. Pico, 457 U.S. 853, 866-67, 870-71 (1982) (holding that students have a First Amendment right to receive information and that, while the school must make content-based decisions, it cannot make the decisions based on viewpoint discrimination).

81. The government mandate for universities includes various goals of excellence. For example, the Obama administration has visibly posted on its website that it wants to "have the highest proportion of students graduating from college in the world by 2020." The White House, Education, http://www.whitehouse.gov/issues/education/ (last visited Nov. 24, 2009).

82. *See, e.g.*, University of Louisiana at Lafayette, Admission Requirements, http://admissions.louisiana.edu/basics/requirements.shtml (simply requiring the completion of Louisiana's high school course requirements); University of Kentucky, Undergraduate Admissions, *available at* http://www.uky.edu/Admission/homefros happly.htm (follow "The Pre-College Curriculum" hyperlink) (requiring four credits of English, three credits of math, three credits of science, three credits of social science, two credits of foreign language, one credit of history of a visual or performing art, a half credit of health, and a half credit of physical education); *cf.* Minimum Requirements for

If a court determines that pre-college curricula policies are comparable to the cases in which the government is making necessarily content-based decisions about the benefits it is bestowing, the policies will only be subjected to intermediate scrutiny, which has no single definition, but generally means something less rigorous than strict scrutiny and more rigorous than rational basis review.[83] Under this deferential standard, a facially neutral policy will almost certainly be constitutional, unless it imposes "a disproportionate burden calculated to drive 'certain ideas or viewpoints from the marketplace.'"[84] Therefore, unless a policy is applied in a manner that establishes a consistent pattern of discriminatory rejections, such a policy will likely satisfy intermediate scrutiny review.

On the other hand, if a court finds that the policies are distinguishable from the cases in which the government is making necessarily content-based decisions about the benefits it is bestowing, which is equally likely, the policies should be deemed content-based regulations of private speech that are subject to strict scrutiny. In order to satisfy a strict scrutiny review, the government regulation must further a compelling government interest and must be narrowly tailored to that government interest.[85] Under this standard of review, it is likely that admissions policies that require syllabi approval are unconstitutional because although they fulfill an important government interest (excellence in higher education), they are not narrowly tailored to this interest because there are other, less intrusive ways of achieving that goal, such as requiring the signature of a high school counselor to verify completion of the required curricula. On the other hand, especially in light of the evidence that high school rigor is a good predictor for college success, it could be argued with some success that this type of policy is narrowly tailored to the government interest in rigorous higher education because reviewing syllabi is the only way to truly ensure that admitted students have had a strenuous high school course load. If a policy does not require syllabi review, but instead simply requires a transcript

High School Graduation, 704 KAR 3:305 (Feb. 1, 2006) *available at* http://www.education.ky.gov/kde/instructional+resources/high+school/refocusing+secondary/high+school+graduation+requirements.htm (follow "704 KAR 3:305 Regulation" hyperlinks) (outlining the Kentucky high school graduation requirements, which differ from the University of Kentucky's admission requirements only in that they do not require the completion of a foreign language).

83. *See* Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 791 (1994) (explaining the concept of intermediate scrutiny, and creating an additional level of intermediate scrutiny, called intermediate-intermediate scrutiny).

84. *Finley*, 524 U.S. at 587.

85. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993).

review, the policy is even more likely to survive strict scrutiny review because it is more narrowly tailored and is less intrusive on private high schools' free speech rights.

b. Compelled Speech

In addition to viewpoint discrimination, there is one less infamous as-applied free speech argument that is particularly applicable to admission policies, and which may influence a conflicted court. Potential plaintiffs may argue a university policy compels secular speech in religious schools, especially if the policy requires the teaching of some specific, secular concepts such as evolution. In the seminal case of *West Virginia State Board of Education v. Barnette*,[86] the Supreme Court held that a Board of Education resolution compelling school children to salute the American flag was an unconstitutional violation of the Free Speech Clause because it compelled speech.[87] Still, pre-college curricula policies should not be vulnerable under this theory because they will not typically compel any particular speech. The policies will likely only compel secular speech if they require the teaching of specific concepts, or if they force high schools to use texts from a pre-approved textbook list.

To summarize, it is clear that classroom instruction is protected speech, university pre-college curricula policies are content-based regulations on that speech, the policies permissibly control government speech when they are applied to public high schools, and they control private speech when they are applied to private high schools. However, it is unclear whether the application of the policies to private schools is constitutional under the free speech clause. If a court finds that a university's decisions about applicants' high school courses are comparable to the necessarily content-based decisions about private speech that the National Endowment for the Arts, public television stations, and public libraries must make about private speech, intermediate scrutiny will apply, and the policy is likely constitutional. Alternatively, if a court finds that these policies are distinguishable because the necessarily content-based cases usually involve the dispersal of private speech and are absolutely necessary to fulfill their government mandate, strict scrutiny will apply, and the policies may be unconstitutional if the judge finds no compelling government interest or a lack of narrow tailoring to that government interest.

86. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).
87. *See id.* at 645-46.

B. *The Religion Clauses*

The Establishment Clause and the Free Exercise Clause of the First Amendment collectively form the Religion Clauses: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."[88]

1. The Establishment Clause

Lemon v. Kurtzman[89] is the seminal Establishment Clause case. Since 1971, the *Lemon* test has been the dominating framework in determining the constitutionality of allegedly religious regulations.[90] Under that test, "[f]irst, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, finally, the statute must not foster 'an excessive government entanglement with religion.'"[91] Although the *Lemon* framework has survived, the test has been altered over the years.[92] Most importantly, the test is now expressed in only two primary inquiries: whether there is a secular purpose and whether the effect advances or inhibits religion.[93]

The latter inquiry, the effects test, is further divided into three secondary tests: whether there is governmental indoctrination of religion, whether the recipients of the government aid are defined by reference to religion, and whether there is excessive entanglement of religion and government.[94] The first two prongs of the effects test are inapplicable to the issue at hand because they are specifically tailored to a claim of government *advancement* of religion, not inhibition. This inherent bias in the test results from the fact that the vast majority of Establishment Clause jurisprudence addresses improper government benefits to religion.[95] The skewed nature of the precedent has even prompted the Supreme Court to recently refuse to analyze a claim of government inhibition of religion under the Establishment Clause, and instead focus only on the Free Exercise Clause.[96] For the sake of equal

88. U.S. CONST. amend. I.
89. Lemon v. Kurtzman, 403 U.S. 602 (1971).
90. *See id.* at 612-13.
91. *Id.* (internal citations omitted).
92. *See, e.g.*, Mitchell v. Helms, 530 U.S. 793, 808 (2000); Agostini v. Felton, 521 U.S. 203, 204-05 (1997).
93. *See Agostini*, 521 U.S. at 204-05.
94. *See* Simmons-Harris v. Zelman, 536 U.S. 639, 662-63 (2002); *Agostini*, 521 U.S. at 204-05.
95 *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532 (1993).
96. *See id.*

treatment here though, the purpose test and the excessive entanglement prong of the effects test will be briefly analyzed here.

There will almost always be a secular purpose behind any course requirement policy, namely to ensure that collegiate scholars are academically prepared. Facial neutrality is not dispositive, but if the policy is facially neutral, a plaintiff "must be able to show the absence of a neutral, secular basis for the lines government has drawn."[97] Therefore, unless a policy explicitly excludes courses from certain religious schools, or requires purely secular discussion in the core curricula (in which cases it could be argued there is no conceivable secular purpose for the distinctions), pre-college curricula policies will likely have constitutional purposes under the Establishment Clause.

The question of whether there is excessive entanglement, however, is not so quickly resolved. "[T]o assess entanglement, we have looked to 'the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority.'"[98] Again, the criteria are premised on the assumption that the claim is one of advancement of religion. Therefore, only the last of these criteria may be analyzed here.

At first glance, it appears the relationship between the public university and the religious schools that results from course requirements is permitted under the Establishment Clause because the Court has held that recordkeeping requirements and administrative contact that stem from a generally applicable law or policy do not result in a relationship of excessive entanglement.[99] However, in striking down the NLRB's request to assert jurisdiction over two groups of Catholic high schools, the Court held: "The substantial religious character of these church-related schools gives rise to entangling church-state relationships of the kind the Religion Clauses sought to avoid."[100] Therefore, if a policy goes beyond a mere administrative relationship, it is especially susceptible to an entanglement critique by religious schools.

This vulnerability will be enhanced if a particular course policy employs officials to educate high schools about the policy. For example, UC provides educators and "outreach personnel," also known as the "Cadre of Experts," to help schools comply with their course

97. Gillette v. United States, 401 U.S. 437, 452 (1971).

98. *Agostini*, 521 U.S. at 232 (quoting Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971)) (alteration in original).

99. *See* Jimmy Swaggart Ministries v. Bd. of Equalization of Cal., 493 U.S. 378, 394-95 (1990).

100. NLRB v. Catholic Bishop of Chi., 440 U.S. 490, 503 (1979).

requirements.[101] It could be argued that these UC personnel cause an excessive entanglement, and that monitoring may be necessary to maintain the separation of church and state, especially when the "Experts" make instructional presentations to religious schools.[102] Furthermore, if a policy requires that a university representative personally attend one or more classes throughout the year to ensure compliance, it is even more likely the resulting relationship between government and religion would constitute excessive entanglement.

However, challenges to UC's Cadre of Experts or any form of public official monitoring are still likely to fail because *Agostini v. Felton*[103] held that the presence of public teachers in parochial schools pursuant to a government remedial education program is permissible entanglement under the Establishment Clause.[104] Course admission policies that require some instruction or monitoring in religious schools are comparable to the remedial program teachers at issue in *Agostini* because both involve public officials dispersing secular information in religious schools for a publicly funded education program. Therefore, there should be no excessive entanglement as a result of these policies. Moreover, any entanglement that results from a pre-college curricula policy will be less severe than the constitutional entanglement at issue in *Agostini* because there is no daily student instruction, as there was in *Agostini*.[105]

Finally, it should be noted that Establishment Clause jurisprudence has specifically held that certain mandates of curricula are unconstitutional. For example, statutes that require the teaching of creationism or forbid the teaching of evolution are unconstitutional under the Establishment Clause.[106] Pre-college curricula policies will not likely require or prohibit the teaching of specific concepts related to religion because such a provision would immediately raise Religion Clause alarm bells. However, if a policy provides a list of approved textbooks for the core curricular courses, and if such a list only included biology books that teach evolution without contemporaneous instruction in creationism,

101. *See* University of California, Support & Assistance (Cadre of Experts), http://www.ucop.edu/a-gGuide/ag/support.php (last visited Nov. 24, 2009).

102. *See Agostini*, 521 U.S. at 221-22 (discussing the entanglement that results when publicly funded teachers educate in religious schools).

103. Agostini v. Felton, 521 U.S. 203 (1997).

104. *See id.* at 234.

105. *See id.*

106. *See, e.g.*, Edwards v. Aguillard, 482 U.S. 578, 596-97 (1987) (holding that the Louisiana Creationism Act, which forbids the teaching of evolution without the accompaniment of Creationism, violates the Establishment Clause because it advances religion); Epperson v. State of Ark., 393 U.S. 97, 106-09 (1968) (holding that a statute forbidding the teaching of evolution is not religiously neutral under the Establishment Clause).

it could be argued that the state is effectively requiring the teaching of evolution and excluding the teaching of any alternative religious theories. Such a policy could be in violation of the Establishment Clause due to a lack of religious neutrality because it indirectly forbids the teaching of religious creationism theories in the science classrooms of religious schools.

In summary, under the Establishment Clause analysis, a policy will likely have a secular purpose unless it prohibits the acceptance of courses from a particular variety of religious school, or prohibits the acceptance of all courses taught from a religious perspective. Moreover, due to the generous entanglement precedent in *Agostini v. Felton*, there will not likely be any excessive entanglement associated with a pre-college curricula policy, even if the policy requires instruction or monitoring in religious schools. The only legitimate entanglement concern would arise if the policy required or prohibited the teaching of specific religious concepts, either directly or indirectly through the use of an exclusive list of approved textbooks.

2. Free Exercise Clause

Free Exercise Clause analyses are conducted under their own unique test. In its most recent Free Exercise Clause pronouncements, the Supreme Court held that a court must begin by determining whether there is religious animus in the law; if there is, the statute is presumptively unconstitutional.[107] If the statute is not a result of religious animus, a court must determine whether the statute is facially neutral and whether it is of general applicability.[108] In the absence of neutrality, the government must show that there is a compelling government interest and that the statute is narrowly tailored to the purpose (strict scrutiny).[109] If the statute is neutral and of general applicability, it is constitutional under the Free Exercise Clause as long as it is rationally related to a legitimate government interest (rational basis).[110]

In addition to common law guidance, there are two federal acts that must be considered in Free Exercise cases. First, the Religious Freedom Restoration Act proclaimed that all free exercise claims must be evaluated under strict scrutiny.[111] However, the law was subsequently

107. *See* Locke v. Davey, 540 U.S. 712, 725 (2004).
108. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993).
109. *See id.* at 546.
110. *See id.* at 531; Axson-Flynn v. Johnson, 356 F.3d 1277, 1294 (quoting United States v. Hardman, 297 F.3d 1116, 1126 (10th Cir. 2002)).
111. *See* 42 U.S.C.A. § 2000bb (West 2009).

deemed unconstitutional when applied to local and state regulations in *City of Boerne v. Flores*.[112] Case law suggests that the law still applies to the federal government.[113] Because state universities should be considered extensions of state government, the Act should not apply to pre-college curricula policies. However, the Religious Land Use and Institutionalized Persons Act of 2000 may nullify this inapplicability.[114] In this 2000 Act, it was ordered that strict scrutiny be applied when the government imposes a land use regulation that places a "substantial burden" on the free exercise of religion by an "individual," which includes religious assemblies and institutions.[115] Thus, when religious institutions challenge pre-college curricula policies, this Act would require strict scrutiny, in spite of the neutrality and general applicability of the policy, if a court determines that a policy places a substantial burden on the schools' ability to use their property as they choose.[116]

Consequently, a university defendant that faces a free exercise challenge to their pre-college curricula policy may have to demonstrate a compelling government interest and prove the regulation is narrowly tailored to that interest.[117] Even if this high burden is imposed though, universities will likely satisfy the standard because the government interest in producing prepared college students is very compelling. Additionally, there is likely no less intrusive alternative way of ensuring preparedness because without a thorough review of high school courses, universities would have to guess at the rigor of high school work based on a given high school's reputation. Even a policy that accepts or rejects courses based on individual reviews of their content, like UC's policy, is arguably narrowly tailored because if every high school science course qualified as college preparatory, the purpose of the guidelines would not be fulfilled since they would not ensure any particular level of preparedness. Therefore, a free exercise challenge to pre-college curricula policies is likely to fail even if heightened scrutiny is applied.

In sum, if the judge determines that a course prerequisite policy places a substantial burden on the exercise of religion in religious schools, strict scrutiny will apply and the judge will have to make a second discretionary finding: whether there is a compelling government interest and if so, whether the regulation is narrowly tailored to that

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

113. *See* Kikumura v. Hurley, 242 F.3d 950 (10th Cir. 2001); *In re* Bruce Young v. Crystal Evangelical Free Church, 141 F.3d 854 (8th Cir. 1998).

114. 42 U.S.C.A. § 2000cc (West 2009).

115. *See id.*

116. *See* Widmar v. Vincent, 454 U.S. 263, 270 (1981).

117. *See* Grutter v. Bollinger, 539 U.S. 306, 326 (2003) (noting that strict scrutiny requires a narrowly tailored compelling government interest).

interest. Under this strict scrutiny test, a court could come to either conclusion, but is likely to find that the policy is narrowly tailored to a compelling government interest due to the strong government interest in rigorous higher education institutions. On the other hand, if a court finds that the policy does not place a substantial burden on religious schools' ability to use their property as they desire, rational basis review will apply, and the policy will likely be constitutional.

C. The Equal Protection Clause

The Equal Protection Clause provides that "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."[118] The first two steps in establishing an equal protection argument are proving the existence of a classification under the challenged law, and indentifying the appropriate level of scrutiny.[119] In order to identify a classification, the law must create the classification, or, if the law is facially neutral, there must be a discriminatory purpose behind the law; discriminatory impact is not sufficient to make out a claim.[120] The appropriate level of scrutiny depends on the nature of the claim.[121] Race, national origin, and "alien" challenges receive strict scrutiny.[122] Gender and non-marital children challenges receive intermediate scrutiny review.[123] All other challenges are reviewed under the rational basis standard.[124] Under these guidelines, a religious challenge under the Equal Protection Clause would necessarily be evaluated under rational basis review because race, national origin, alien, gender, and non-marital children challenges are not at issue here. It should be noted that religion is a fundamental right, and fundamental rights are typically awarded strict scrutiny for equal protection claims.[125] However, an anomaly dictates that when a law does not violate the Free Exercise Clause, it only

118. U.S. CONST. amend. XIV.

119. *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 289-91 (1978) (discussing first the existence of a classification, then determining the level of scrutiny).

120. *See* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1979).

121. *See* Clark v. Jeter, 486 U.S. 456, 461 (1988); Frontiero v. Richardson, 411 U.S. 677, 686 (1973); Graham v. Richardson, 403 U.S. 365, 372 (1971); Korematsu v. United States, 323 U.S. 214, 216 (1944).

122. *Graham*, 403 U.S. at 372; *Korematsu*, 323 U.S. at 216.

123. *See Frontiero*, 411 U.S. at 686.

124. *See Clark*, 486 U.S. at 461.

125. *See* United States v. Virginia, 518 U.S. 515, 567 (1996) (noting that fundamental rights receive strict scrutiny in equal protection claims); Johnson v. Robison, 415 U.S. 361, 375 n.14 (1974) (noting that religion is a fundamental right), *superseded by statute*, Veterans' Judicial Review Act of 1988, Pub. L. No. 100-687, 102 Stat. 4105.

receives a rational basis review for the equal protection analysis.[126] Therefore, if hypothetical plaintiffs win on their free exercise challenge, which seems unlikely here, they will be awarded strict scrutiny for the equal protection claim. If not, rational basis will apply.

Equal Protection challenges to pre-college curricula policies should fail because there are not likely any classifications in policies on which an equal protection claim could be based. As was previously noted, equal protection claims require a classification, or alternatively, a discriminatory purpose.[127] Unless a course requirement specifically excludes courses from a certain group of religious schools, which is highly unlikely, or unless it can be proven the policy was enacted to prevent the admission of certain kinds of religious students, which is equally unlikely, these necessary elements will not be met. Plaintiffs could potentially make out a discriminatory impact claim, but such a claim would have to be brought under the Civil Rights Act of 1964, not under the Constitution.[128] Due to the lack of classifications and discriminatory purposes in pre-college curricula policies, an equal protection challenge should be swiftly dismissed without further analysis.

In short, a pre-college curricula policy will only violate the Equal Protection Clause if it creates a classification by requesting different admission requirements from religious school students, or if it otherwise has a purpose of preventing the admission of religious school students.

126. *See* Locke v. Davey, 540 U.S. 712, 721 (2004) (noting that when the Court determines that a law does not violate the Free Exercise Clause, rational basis will be applied to the equal protection claim).

127. *See* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1979).

128. The Equal Protection Clause does not permit claims of mere discriminatory impact. *See* United States v. Coleman, 24 F.3d 37, 39 (9th Cir. 1994) (noting that discriminatory impact is not enough to prove a violation of Equal Protection Clause without accompanying discriminatory purpose). However, Title VI and Title VII of the Civil Rights Act of 1964 allow claims of discriminatory impact. *See* United States Department of Justice, Coordination and Review Section, http://www.usdoj.gov/crt/cor/coord/titlevi.php ("Title VI itself prohibits intentional discrimination. However, most funding agencies have regulations implementing Title VI that prohibit recipient practices that have the effect of discrimination on the basis of race, color, or national origin."); Connecticut v. Teal, 457 U.S. 440, 442 (1982) (allowing a disparate impact claim under Title VII of the Civil Rights Act of 1964). Plaintiffs challenging a pre-college curricula policy may have standing to bring a disparate impact claim under Title VI, but because this issue does not involve employment, they would not be able to bring such a claim under Title VII. *See Bakke*, 438 U.S. at 284 (allowing a medical school applicant to assert a right of action under Title VI).

D. Academic Freedom

Finally, the unenumerated First Amendment principle of academic freedom must be considered a defining concept in this case. The idea of academic freedom is perhaps most ably expressed by former Supreme Court Justice Powell:

> Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body. Mr. Justice Frankfurter summarized the 'four essential freedoms' that constitute academic freedom: "It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university-to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."[129]

Thus, the concept of academic freedom clearly applies in cases involving university admissions policies. As a result, both the plaintiff and the defendant in these challenges will argue they should be given deference because of their right to control the content of curriculum and of the student body, respectively. However, because academic freedom is not an enumerated right, it is unclear how much weight judges would, or should, grant this discretionary concept.

In summation, a court could use the discretionary concept of academic freedom to support either a finding of constitutionality or unconstitutionality. Because there are legitimate arguments to support either outcome under the Constitution, a judge could rule according to his or her policy beliefs under the guise of a ruling on academic freedom. The following synopsis of the initial summary judgment ruling in *A.C.S.I. v. Stearns* provides one example of how a judge could rule on these constitutional issues.

E. A.C.S.I. v. Stearns

The District Court for the Central District of California demonstrates how one court has weighed the competing interests of conservative Christian high school students and a public university's desire to strengthen admission standards.[130] In tackling the free speech claim, Judge Otero ruled that rational basis is the standard of review

129. *Bakke*, 438 U.S. at 312 (internal citations omitted).
130. *See* Second Summary Judgment, *supra* note 20.

because the government must necessarily make content-based decisions about admission to the university.[131] Judge Otero held that as long as the regulation is rationally related to a legitimate government purpose, and as long as there is no government animus, the regulation is constitutional under the Free Speech Clause.[132] Judge Otero further found that because the case at hand is most comparable to *National Endowment for the Arts v. Finley*, heightened scrutiny is not applicable.[133] In applying this deferential standard, Otero ruled that UC's policy is reasonable and is not the product of religious animus.[134] Moreover, the court found that the regulation is not facially overbroad.[135] Additionally, the court rejected the plaintiffs' claim under the unbridled discretion doctrine, which strikes down laws that give government officials unbridled discretion because they constitute a prior restraint on free speech.[136] Judge Otero held that the doctrine is inapplicable to UC's policy because the regulation is not a prior restraint on expressive behavior.[137] Furthermore, he found that even if the unbridled discretion doctrine is a permissible claim, it would fail in application because UC course reviewers were given sufficient guidance on how to conduct their reviews.[138]

The Religion Clause challenges were more easily dismissed by Judge Otero. He quickly found that the regulation does not violate the Establishment Clause because it does not have the primary purpose or effect of advancing or inhibiting religion, and it does not lead to excessive entanglement between government and religion.[139] Otero also held that the regulation does not violate the Free Exercise Clause because it is rationally related to a legitimate government interest and is not the result of religious animus.[140] Judge Otero applied rational basis to the claim pursuant to the Supreme Court's opinions in *Department of Human Resources of Oregon v. Smith*[141] and *Church of the Lukumi Babalu Aye,*

131. *See* First Summary Judgment, *supra* note 22, at 12.
132. *See id.* at 13.
133. *See id.* at 14.
134. *See id.* at 17-22 (holding that the guidelines are substantively reasonable, the reviewers are qualified, the review process is not unreasonably probabilistic, and the reviewing of only California high school courses is not unreasonable), 23-27 (holding that there is no animus because the regulation is more like the scholarship program that denied aid to theology students, which was not the result of animus, than the criminal statute prohibiting animal sacrifice directed at a religious sect in *Lukumi*, which was the result of animus).
135. *See id.* at 28.
136. *See id.*
137. *See* First Summary Judgment, *supra* note 22, at 30.
138. *Id.* at 28-31.
139. *See id.* at 33-34.
140. *See id.* at 35-36.
141. Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990).

Inc. v. City of Hialeah, which announced that neutral laws of general applicability need not be subjected to strict scrutiny review in free exercise challenges.[142]

Finally, Judge Otero held that plaintiffs' Equal Protection claim should only be awarded rational basis review because UC's policy was found not to violate the Free Exercise Clause. Furthermore, because it was already determined that the regulation met rational basis review, the Equal Protection claim had no merit.[143]

IV. POLICY CONCERNS

A. *Pre-College Curricula Policies are Necessary*

Universities must utilize pre-college curricula policies in their admissions. First, there are signs that American students are being outcompeted by students in many other countries. High school course policies are one tool universities should use in the hopes of beginning to compete internationally with other top education countries. Second, the number of college applicants is rising, and in response, universities must continue to find non-discriminatory methods of increasing their selectivity. Course policies are perfectly tailored to this goal. Lastly, as universities face significant numbers of non-traditional high school students, they must find ways to fairly and equally assess the strength of all applicants' prior curricula. Again, rigorous pre-college curricula policies are the ideal tool for this task.

1. The United States' Need to Become Internationally Competitive in Education

The trendy, catchall explanation for many of the worlds' dilemmas, globalization, has long been associated with the symbolic international spread of American corporate giants such as McDonalds and Wal-Mart. However, the new face of globalization is hidden in the less glamorous arena of education reform, and Americans must join other countries in the quest for superior education if they are to enjoy the prowess already attained in the corporate economic market. In the 2008 online "Education Olympics," a compilation of international testing scores released by the Thomas B. Fordham Institute, the United States ranked twentieth in the total "medal count," of the twenty-three nations that won medals.[144] The United States finished with just one medal, whereas

142. *See id.* at 884-85; Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993); First Summary Judgment, *supra* note 22, at 35-36.
143. *Id.* at 36-37.
144. *See* THOMAS B. FORDHAM INST., *supra* note 27, at 7-8.

Finland led the pack with thirty-five medals.[145] Granted, little weight should be afforded a single web-based competition, and at least one article has already criticized the conclusions of the report.[146] Still, the Education Olympics generated unflattering press for a country already facing increasing criticism about its math and science education.[147]

Moreover, a recent report issued by the National Governor's Association expresses deep concern about the economic implications of the United States' lagging math and science scores and declining graduation rates.[148] The report concludes that "if the United States raised students' math and science skills to globally competitive levels over the next two decades, its GDP would be an additional 36 percent higher 75 years from now."[149] In order to ameliorate the inadequacy, the report suggests that states adopt core curricula requirements at the K-12 level that are benchmarked against international standards.[150] The standards would include the use of competitive textbooks, media, and assessments.[151] Some states have already recognized the need for uniform core standards, and have adopted programs that aim to align high school curricula with the state's public university curricula admission standards. These state curricula programs, such as Indiana's Core 40 program,[152] have been popping up with startling rapidity.[153]

145. *See id.*

146. *See* Edward García Fierros & Mindy L. Kornhaber, *Review of Education Olympics 2008: The Games in Review*, THE THOMAS B. FORDHAM INST., Oct. 10, 2008, *available at* http://epicpolicy.org/thinktank/review-education-olympics (follow "Think Tank Review" hyperlink) (calling attention to the methodological weaknesses in the report, and casting doubt on the report's claim that low American test scores will negatively impact the American economy).

147. *See, e.g.*, A Disappointing Finish for Americans at Education Olympics, http://www.usnews.com/blogs/on-education/2008/8/29/a-disappointing-finish-for-americans-at-ed ucation-olympics.html (Aug. 29, 2008, 12:53 EST); Dillon, *supra* note 27.

148. *See* NAT'L GOVERNORS ASSOC., THE COUNCIL OF CHIEF STATE SCHOOL OFFICERS, AND ACHIEVE, INC., BENCHMARKING FOR SUCCESS: ENSURING U.S. STUDENTS RECEIVE A WORLD-CLASS EDUCATION 5-6 (2008), *available at* http://www.edweek.org/ew/articles/2008/12/18/16nga.h28.h tml?tmp=1862657928 [hereinafter GOVERNORS] (noting that in an international 2006 study American fifteen year olds ranked 25th in math and 21st in science, and that American college graduation rates have dropped from being tied for 1st place in 1995, to 14th place in 2006).

149. ROADBLOCKS, *supra* note 39, at 5.

150. *See* GOVERNORS, *supra* note 148, at 6.

151. *See id.*

152. *See* Indiana Department of Education, Indiana Core 40: Your Academic Edge, http://www.doe.in.gov/core 40/overview.html (last visited Dec. 11, 2009).

153. Eighteen states offered college preparatory diplomas in 2002, but in 2006, that number had grown to twenty-five. *See* American Association of State Colleges & Universities, *High School Coursework: Policy Trends and Implications for Higher Education*, POLICY MATTERS, July 2006, http://www.aascu.org/policy_matters/v3_7/default.htm [hereinafter POLICY MATTERS]; JENNIFER DOUNEY, ALIGNMENT OF HIGH

The University of California's a-g requirements can be viewed as another such program designed to ensure competency in students in the transition between high school and college, in the hopes of becoming internationally competitive. UC was early to recognize that K-12 state standards are not the only way to heighten international competitiveness, and that universities could and should also capitalize on the trend toward rigorous curricula standards. But with the public release of the Governors' Benchmarking for Success Report, and with states' increasing desire to create more rigorous uniform curricula programs, other universities with an eye toward international benchmarks should follow suit by strengthening their standards.

2. Universities' Need to Respond to Admission Trends

If current admission trends continue, universities will be forced to become more selective due to the increasing numbers of applicants. Conveniently for the country, this increased selectivity is also arguably the most effective way to improve the quality of our universities.[154]

Recent trends in college admissions reveal that grades in college preparatory courses and the strength of high school curriculum have consistently been the top factors in admission.[155] The more selective American colleges, which often face difficulties distinguishing among applicants with "similarly high grades and test scores," have begun using the existence of honors and AP course work on transcripts to make

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SCHOOL GRADUATION REQUIREMENTS AND STATE-SET COLLEGE ADMISSIONS REQUIREMENTS 18 (2006), http://www.ecs.org/html/IssueSection.asp?issueid=76&s=What+States+Are+Doing. Other states have begun requiring students to complete "a college- and work- ready curriculum." *See* POLICY MATTERS, *supra*. Moreover, many states have created education initiatives that attempt to train students to fit the local economic needs. *See* Kathy Christie, *Link Investment in Education to Economic Health*, STATELINE, Dec. 2008, at 237-239, *available at* www.ecs.org/html/clearinghouse/Stateline-dec.pdf.

154. While there are other ways to increase academic caliber, such as hiring better professors or funding more research, a university is, in essence, defined by its student body; therefore, the best way for a university to increase its prestige is to admit only the most qualified applicants. Furthermore, because research shows that strenuous high school course work is a reliable indicator of collegiate academic success, the strengthening of curricula standards is a relatively fail-proof way of boosting academic success during college. *See* Philip M. Sadler & Robert H. Tai, *Accounting for Advanced High School Coursework in College Admission Decisions*, 82 COLL. & UNIV. J. 7, 12 (2007) (finding that "two variables were found to correspond to substantially better performance in college science courses: increasing rigor of high school science experience and higher grades in high school science courses.").

155. *See* NAT'L ASSOC. FOR COLL. ADMISSION COUNSELING, STATE OF COLLEGE ADMISSION REPORT 2007 iii, 34-35 (2007), *available at* http://www.nacacnet.org/PublicationsResources/Research/Reports/Pages/default.aspx (follow "State of College Admission Report 2007" hyperlink).

admissions decisions.[156] Additionally, selectivity has risen due to increased numbers of applicants,[157] and reliance on test scores has risen, in spite of increasing concern about its reliability and susceptibility to biases.[158] Although grades in college preparatory courses and the strength of high school curriculum have not risen in importance, they have remained top factors.[159] Due to the increasing pressure to move away from test scores[160] and to find non-discriminatory policies that increase academic rigor and diversity (for example, Texas' top ten percent plan),[161] coupled with the increasing need to be more selective, public universities will likely need to create more strenuous course admissions requirements in the future.

3. Universities' Need to Ensure Proper Assessment of High School Rigor

Not only must universities respond to admission trends, but they must also ensure that the rigor of applicants' high school experiences is fairly assessed. The need for fair assessment is perhaps most pronounced when applicants have attended non-traditional high schools. Homeschooling, for example, lacks the assurance that high school accreditation provides. As a result, universities must critique homeschooled applicants more carefully to ensure that they properly take into consideration the rigor of applicants' high school experience when comparing grades and other markers. Indeed, many universities have instituted special homeschooled application policies, presumably with

156. *Id.* at 35; *see also* SAUL GEISER & VERONICA SANTELICES, THE ROLE OF ADVANCED PLACEMENT AND HONORS COURSES IN COLLEGE ADMISSIONS 2 (2004), *available at* http://cshe.berkeley.edu/publications/publications.php?id=72.

157. *See* NAT'L ASSOC. FOR COLL. ADMISSION COUNSELING, *supra* note 155, at iii.

158. NAT'L ASSOC. FOR COLL. ADMISSION COUNSELING, REPORT OF THE COMMISSION ON THE USE OF STANDARDIZED TESTS IN UNDERGRADUATE ADMISSION 7 (2008), *available at* http://www.eric.ed.gov/ERICWebPortal/custom/portlets/recordDetails/detailmini.jsp?_nfpb=true&_&ERICExtSearch_SearchValue_0=ED502721&ERICExtSearch_SearchType_0=no&accno=ED502721 (follow "ERIC Full Text" hyperlink) [hereinafter STANDARDIZED TESTS] (questioning the ways in which colleges are using standardized test scores as a measure of the strength of college applicants).

159. *See* NAT'L ASSOC. FOR COLL. ADMISSION COUNSELING, *supra* note 155, at iii, 34-35.

160. *See generally* STANDARDIZED TESTS, *supra* note 158 (questioning the ways in which colleges are using standardized test scores as a measure of the strength of college applicants).

161. Angela Hough, *All Deliberate Ambiguity: The Question of Diversity, College Admissions, and the Future of the Texas Top-Ten-Percent Plan*, 39 TEX. TECH L. REV. 197, 198 (2006) (discussing Texas' plan that awards automatic admission to state universities to students who graduate in the top ten percent of their class, as an alternative to race consideration in their quest for diversity).

this goal in mind.[162] Although universities may seek to downplay these differential standards,[163] most would agree that universities are justified in their differential treatment of non-traditional high school students because they must effectively compare applicants' high school experiences.

Like the homeschooled applicants, students from religious schools receive a somewhat untraditional high school education because the courses are taught from a religious perspective.[164] If the coursework differs so vastly from that of public schools that the quality of the secular course content suffers, extra procedural steps are justified for these applicants for the same reason homeschooled students are commonly subjected to special requirements. At a minimum, it can be argued that high school course requirements for all applicants provide a modicum of insurance against unequal high school comparisons.

B. *Universities Must Not Discriminate Against Religious High School Students in their Pre-College Curricula Policies*

The question remains, however, whether these curricula-based admissions policies actually disadvantage religious high school students, and if so, whether we as a nation should be promoting them. Most academically successful religious high school students yearn to be accepted by prestigious colleges, just like their public school counterparts. Due to this intense competition for coveted college spots, the college admissions process must be examined for any biases and discrimination. According to data collected by UC and the University of California Los Angeles ("UCLA"), a bias already exists against UC

162. *See, e.g.*, Penn State University, Homeschool Requirements, http://admissions.psu.edu/academics/majors/requirements/homeschool/ (last visited Nov. 22, 2009) (requiring from homeschooled applicants: "detailed documentation of their high school coursework and evaluations of progress from an approved homeschool evaluator or supervisor"); University of Georgia, Home Educated Or Non Accredited High School, http://www.admissions.uga.edu/article/home_educated_or_non_accredited_high_school.html (last visited Nov. 22, 2009) (outlining the special admission requirements for homeschooled applicants); University of Washington, Homeschooled Applicants, http://admit.washington.edu/Requirements/Freshman/Homeschool (last visited Nov. 22, 2009) (outlining the special admission requirements for homeschooled applicants).

163. Penn State University, for instance, notes in bold letters on its website that its admission standards are the same for all applicants, in spite of the fact that it requires extra steps for homeschooled applicants. *See* Penn State University, Homeschool Requirements, http://admissions.psu.edu/academics/majors/requirements/homeschool/ (last visited Nov. 25, 2009).

164. *See, e.g.*, Calvary Murrieta Christian Schools: Academics, http://www.cccsmurrieta.com/secondary/academics.asp (last visited Nov. 25, 2009) (noting the religious nature of the education).

applicants from high schools with large numbers of minority students.[165] The number of a-g courses available at high schools with high percentages of racial minorities is significantly lower than the number available at predominately white schools,[166] and this dearth of a-g offerings makes it "far more difficult" for those students at minority schools to complete the necessary a-g requirements.[167] Theoretically, the rejection of some courses with religious perspectives should similarly disadvantage religious high school students. However, it is unclear whether that supposition is true because at the time of the *ACSI v. Stearns* lawsuit, no CCCS student had been rejected by UC due to a lack of a-g courses.[168] If research does demonstrate any disadvantage to religious students under pre-college course policies, however, religious schools may argue that the standards are unwise from a policy perspective because they force religious high schools to secularize their curricula, and they effectively decrease diversity in universities.

1. Pre-College Curricula Policies Must Not Force Religious High Schools to Secularize Their Curricula

One crucial policy consideration, as argued in *A.C.S.I. v. Stearns*, is that religious schools are arguably being forced to secularize their curriculum. A lawyer for the plaintiffs in *A.C.S.I. v. Stearns* exclaimed that UC administrators "are trying to secularize private Christian schools. . . . They have taken God out of public schools. Now they want to do it at Christian schools."[169] Truly, if universities like UC begin to increasingly disapprove religious high school courses as pre-college course requirements, schools like CCCS will be forced to use more secular textbooks and teach more secularized classes, or else face large numbers of dissatisfied students who have been rejected from the state universities. Aside from the constitutional concerns this coercion creates, universities must tread carefully when encouraging specific course conduct because of this negative policy repercussion that such incentives would presumably prompt.

2. Universities Must Not Propagate Policies of Selective Diversity

Furthermore, if it can be proven that strenuous curricula policies disadvantage certain religious high school students, it can be argued that

165. *See* ROADBLOCKS, *supra* note 39, at 4-5.
166. *See id.*
167. *See id.* at 5.
168. *See* First Summary Judgment, *supra* note 22 at 2 n.3.
169. *See* Marshall, *supra* note 41.

these policies should not be upheld because they decrease diversity in public universities. Universities should not be able to cherry pick desired types of diversity. In our quest for diverse student bodies, one would be hard-pressed to argue certain religious groups should be excluded from college campuses, no matter how orthodox, unconventional, or devout. In today's globalized market, there is an unmatchable value in engaging in collegiate dialogue with students from a wide range of geographic, social, and religious backgrounds. After all, diversity secures college's esteemed role as the "marketplace of ideas."[170] Thus, students from all kinds of religious schools must be afforded a full opportunity for admission.

V. CONCLUSION

Most public universities' pre-college curricula policies should be found constitutional under the Free Speech Clause, the Religion Clauses, and the Equal Protection Clause. UC's policy was correctly deemed constitutional by the District Court for the Central District of California.[171] However, this type of policy appears to be the outer constitutional limit because if universities begin to implement even stricter standards, such as requirements that direct the content of high school courses, provide for the use of specific textbooks, or summarily reject any course that contains a religious perspective, the policies would likely be unconstitutional under these provisions.

The presence of compelling policy arguments on both sides of the issue make any ruling on this issue a difficult balancing act. Moreover, citizens from different backgrounds will view the issues differently. Therefore, universities should not only carefully weigh the competing constitutional and policy concerns internally, but they should also consider conducting an external dialogue with the public, just as local governments sometimes hold public forums regarding proposed regulations. Such open communication would ideally create an atmosphere in which individuals and organizations associated with non-traditional forms of education could voice their concerns, and the procedure would hopefully result in a compromise policy that is both non-discriminatory and sufficiently rigorous.

Regardless of whether universities adopt this proposed procedural step, they must find ways to strengthen their pre-college course standards in their admission policies without risking court invalidation. In light of the grave statistics and predictions about the United States' faltering education system, the continued economic and political strength of the

170. Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967).
171. *See* Second Summary Judgment, *supra* note 20, at 20.

nation depends upon a rise in educational prowess.[172] Although states could and should aid in this movement by improving K-12 education, universities also play a crucial role in the process, and should make changes accordingly. As the breeding ground for future politicians, scientists, businessmen, and social theorists, universities hold the power not only to remove the self-imposed conception that we are "a nation at risk" educationally, but they also in many ways control our levels of risk in the economy, environment, and modern social settings. This unique position in society requires that universities strive for the highest quality of education achievable within the confines of the Constitution. In pursuit of this goal, the universities of the United States must admit the most knowledgeable students, the raw material with which to shape the innovators of tomorrow.

172. *See supra* notes 144-49 and accompanying text.