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BEYOND ESTABLISHMENT CLAUSE ANALYSIS IN PUBLIC SCHOOL SITUATIONS: THE NEED TO APPLY THE PUBLIC FORUM AND *TINKER* DOCTRINES*

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I. INTRODUCTION

Due to disagreement regarding the proper analytical framework in Establishment Clause cases, the United States Supreme Court at the end of its 1991 term issued one of the most anxiously awaited First Amendment decisions in recent years. Many First Amendment scholars and attorneys hoped the Supreme Court's decision in *Lee v. Weisman*[1] would

1. 112 S. Ct. 2649 (1992). *Weisman* centered on a public school student's challenge to the school district's practice of permitting invocations and benedictions in graduation ceremonies. Following tradition, the student's middle school principal invited a rabbi to deliver a nonsectarian prayer at the graduation ceremonies. *Id.* at 2652. To offer guidance to the rabbi, the principal provided the rabbi with a pamphlet entitled "Guidelines for Civic Occasions." *Id.* When the student learned of her principal's decision to invite the rabbi, she sought a temporary restraining order to prohibit the rabbi from offering a prayer. *Id.* at 2653-54. A federal district court judge denied the motion, citing inadequate time to consider its merits. *Id.* at 2654. The student and her family attended the graduation ceremony where the rabbi offered both the invocation and benediction. *Id.* The student then amended her complaint, requesting a permanent injunction barring prayers at future graduations. *Id.*

The district court ruled in favor of the student, finding that the practice violated the Establishment Clause. The court held that the prayer did not satisfy the Lemon v. Kurtzman, 403 U.S. 602 (1971) requirement that governmental practices "have a primary effect that neither advances nor inhibits religion." *Id.* (quoting Religious Liberty v. Nyquist, 413 U.S. 756, 773 (1973)). On appeal, the First Circuit Court of Appeals adopted the district court's reasoning and held that the graduation prayer violated the Establishment Clause. *Id.*

The Supreme Court granted certiorari and affirmed the lower courts' holding in a 5-4 decision. *Id.* at 2661. Justice Kennedy, writing for the majority, initially established what Establishment Clause questions *Weisman* did not involve: "This case does not require us to revisit the difficult questions dividing us in recent cases, questions of the definition and full scope of the principles governing the extent of permitted accommodation by the State for the religious beliefs and practice of many of its citizens." *Id.* at 2655. Rather, the Court, according to Justice Kennedy, was obligated to follow its prior decisions involving prayer in public schools that mandated the finding that the practice violated the Establishment Clause. *Id.* Three additional factors contributed to this conclusion. First, there was sufficient governmental involvement to trigger Establishment Clause concerns. *Id.* at 2656. As evidence, the Court pointed to the principal's decision to include a prayer, invite the rabbi, and provide the rabbi with the copy of the prayer guidelines. *Id.* Second, a local religious official offered the prayers, creating the impression that the prayer was a religious exercise. Third, Justice Kennedy reasoned that the graduation prayer was a form of psychological coercion in

finally provide the proper framework for an analysis of Establishment Clause cases.[2] Others hoped that the Court, now dominated by appointees of Presidents Ronald Reagan and George Bush, would revise its jurisprudence regarding prayer in America's public schools.

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that it forced some students and parents to participate in an activity that infringed upon their constitutional rights. *Id.* at 2659-60. The Court stated: "The prayer exercises in this case are especially improper because the State has in every practical sense compelled attendance and participation in an explicit religious exercise at an event of singular importance to every student, one the objecting student has no real alternative to avoid." *Id.* at 2661. Furthermore, the Court concluded:

> The undeniable fact is that the school district's supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the Invocation and Benediction. This pressure, though subtle and indirect, can be as real as any overt compulsion.

Id. at 2658. Although the majority stated that *Weisman* was not the proper case to resolve the conflict surrounding the proper test for determining when governmental accommodation of religion is permissible, two concurring opinions touch on this issue and demonstrate how this question divides the Court.

Justice Blackmun wrote a concurring opinion in which Justices O'Connor and Stevens joined. *Id.* at 2661-67 (Blackmun, J., concurring). While Justice Blackmun agreed with Justice Kennedy's conclusion and found that the majority's coercion test was sufficient, he argued for a more stringent test. For Justice Blackmun, an Establishment Clause violation occurs any time the government places a "stamp of approval" on an activity. *Id.* at 2664. Although Justices Kennedy and Blackmun's tests reach the same result in *Weisman*, the two would reach opposite conclusions if the government approves of religion, but no one is coerced into participating in the activity.

In a second concurring opinion, Justice Souter, joined by Justices O'Connor and Stevens, engaged in a lengthy historical analysis and ultimately agreed with Justice Blackmun that coercion was not the touchstone for finding Establishment Clause violations. *Id.* at 2667-78 (Souter, J., concurring). He also argued for a stricter test and indicated that endorsement is the key factor to consider. *Id.* at 2676. He pointed out that government may accommodate religion to remove "a discernible burden on the free exercise of religion." *Id.* at 2677. However no such burden existed in the case at issue. *Id.*

Justice Scalia, along with Chief Justice Rehnquist and Justices White and Thomas, dissented and criticized Justice Kennedy's novel "psychological coercion test." Justice Scalia concluded that while coercion is the proper touchstone for Establishment Clause violations, he found the expansion of "the concept of coercion beyond acts backed by threat of penalty" was unwarranted. *Id.* at 2684 (Scalia, J., dissenting). Justice Scalia also faulted the majority for relying on the school prayer precedent. In prior cases, students were not only required to participate in school prayer or Bible reading but also required to attend school. *Id.* Furthermore, students who did not participate were subject to punishment. *Id.* (citing Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962); West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943)). "[T]he attendance at graduation is voluntary . . . there is nothing in the record to indicate that failure of attending students to take part in the invocation or benediction was subject to any penalty or discipline." *Id.* According to the dissenters, "[v]oluntary prayer at graduation—a one-time ceremony at which parents, friends and relatives are present—can hardly be thought to raise the same concerns" as the cases where parents are not present in the classroom to counter any teaching contrary to their beliefs. *Id.* at 2685 (Scalia, J., dissenting). Concluding his discussion, Justice Scalia stated that because of the "odd basis for the Court's decision, invocations and benedictions will be given at public school graduations next June, as they have for the past century and a half, so long as school authorities make clear that anyone who abstains from screaming in protest does not necessarily participate in the prayers." *Id.* at 2685 (Scalia, J., dissenting).

2. It appears the Justices are divided between two new tests, endorsement and coercion, while still clinging to the *Lemon* test. *See* County of Allegheny v. ACLU, 492 U.S. 573 (1989); Lynch v. Donnelly, 465 U.S. 668 (1984); Marsh v. Chambers, 463 U.S. 783 (1983).

Consequently, upon the Court's issuance of *Weisman*, disappointment resulted. Not only did the Court fail to unravel the tangled web around the Establishment Clause,[3] but it also chose to adhere to its staid position regarding prayer in the public schools.[4]

Perhaps more importantly, *Weisman* also failed to recognize the competing constitutional interests involved: Establishment Clause concerns and free speech.[5] As a result, the Court misconceived the essence of the case. The graduation prayer at issue in *Weisman* is protected under the Free Speech Clause. Yet, in relying solely upon the Establishment Clause for its analytical framework, the Court ignored this interest. Hence, this article suggests that the Supreme Court should no longer erect its analysis of religious speech in America's public schools solely upon the Establishment Clause and proposes an alternative analytical framework composed of forum analysis and free speech concerns.

Part I of this article reviews the history of church-state relations in the United States and demonstrates that the structural, conceptual and institutional evolution of the "church" as well as the "state" renders establishment of a national church, or control of government by the church, virtually impossible. Thus, the historical Establishment Clause concerns generally no longer exist and, if they do, they should be subordinated to any free speech issues also involved. Consequently, the Supreme Court should abandon its traditional Establishment Clause analysis in these cases and implement a free speech analysis. In the public school setting, the particular type of free speech analysis depends upon the particular relationship between the speaker and the public school.

Part II reviews forum analysis and proposes that such analysis is the appropriate analytical framework for cases similar to *Weisman* where an outsider to the public school seeks access to the public school for expressive purposes. Part II applies forum analysis to the facts of *Weisman* to determine whether the Court's *Weisman* decision would have been different through implementation of such forum analysis.

Part III proposes that both the Establishment Clause and forum analyses are inappropriate analytical frameworks when the speaker is a

3. *See Weisman*, 112 S. Ct. at 2655 (indicating that *Weisman* would not be used to resolve the conflict surrounding the proper test for determining when governmental accommodation of religion is permissible).

4. *Id.* (adhering to its prior position on school prayer).

5. Widmar v. Vincent, 454 U.S. 263, 273 (1981) (focusing on whether a university could exclude groups because of the content of their speech).

public school student. The Supreme Court's *Tinker v. Des Moines Independent Community School District*[6] analysis is the most appropriate analytical framework concerning questions of student speech in the public schools. With its objective form of analysis, it best protects the First Amendment rights of public school students.

II. THE ESTABLISHMENT CLAUSE: AN INAPPROPRIATE ANALYSIS

When examining the history of the religion clauses of the First Amendment,[7] at least three factors must be considered: culture, politics and religion. Each of these factors provide a context in which to compare historical objectives of the religion clauses with the environment of modern America.

For instance, the culture of those who framed America's founding documents in the late eighteenth century and the culture of those who followed them in the early nineteenth century are radically different from the contemporary American culture. The United States Constitution was drafted, debated, and ratified in an agrarian environment where black slavery abounded.[8] In addition, massive public education did not exist.[9] There was no global or even national technology; in the 1700s, the basic form of communication among colonial Americans was letter writing.[10]

Similarly, the political climate in contemporary America substantially differs from the climate that existed in 1787 due to the existence of a large, centralized government and deterioration of state sovereignty. For instance, decentralization was a prominent characteristic of colonial

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6. 393 U.S. 503 (1969).

7. The Establishment and Free Exercise Clauses read: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...." U.S. CONST. amend. I.

8. America in 1789 consisted of a series of slave states in seeming contradiction to many Framers' proclamations. Thomas Jefferson, for instance, could rhetorically claim that "all men are created equal" in the Declaration of Independence but possess Black slaves. "How is it," Dr. Samuel Johnson mused, "that we hear the loudest yelps for liberty from the drivers of Negroes?" JOHN C. MILLER, THE WOLF BY THE EARS: THOMAS JEFFERSON AND SLAVERY 8 (1977). *See generally* 6 DUMAS MALONE, JEFFERSON AND HIS TIME: THE SAGE OF MONTICELLO 1948-1977 (1982); FAWN M. BRODIE, THOMAS JEFFERSON: AN INTIMATE HISTORY (1981); RICHARD B. MORRIS, SEVEN WHO SHAPED OUR DESTINY (1973).

9. For further discussion of the increased government involvement in education, see *infra* notes 140-151 and accompanying text.

10. If all this seems improbable, it is because we have forgotten the relative isolation of the American states in the mid-to-late eighteenth century. It was then a four day ride from Boston to New York on the best roads in America. In 1786 James Madison wrote to Thomas Jefferson, "[o]f affairs of Georgia I know as little as those of Kamskatska." *Letter to Thomas Jefferson from James Madison*, *in* 1 MADISON'S WORKS 245 (R. Worthington ed., 1884) (referencing a letter dated August 12, 1786).

government.[11] As one historian notes, a Virginian or a citizen of Massachusetts in 1787 possessed a stronger attachment to Massachusetts or Virginia than to the body of confederated states.[12]

The focus upon state sovereignty led America's first Congress to formulate its unique version of federalism, consisting of limitations upon federal government and broad powers accorded to the individual states. Consequently, the American notion of federalism, rooted in European principles of feudalism,[13] resulted in a colonial system of government containing separated and specified degrees of sovereignty and jurisdiction. As one commentator notes, "[t]his is the essence of the American federal system: the division of power along a vertical axis by removing some of it from the central originating point, the states, and shifting some of it up and some of it down the axis."[14]

Thus, in a federalist system all government is *limited* by agreement.[15] In *The Federalist* Alexander Hamilton called the American

11. The relative isolation of the states, again, may have played a part in the political climate. *See infra* notes 13-18 and accompanying text.

12. ALBERT V. DICEY, LAW OF THE CONSTITUTION 138 (1920) (containing statements by Thomas Jefferson and John Adams referencing Virginia and Massachusetts, respectively, as 'my country'). M. Stanton Evans, *The States and the Constitution*, 2 INTERCOLLEGIATE REVIEW 176, 179 (Nov.-Dec., 1965).

13. JAMES W. THOMPSON & EDGAR N. JOHNSON, AN INTRODUCTION TO MEDIEVAL EUROPE 300-1500, at 305 (1937). As stated:

> It was used by the Englishman John Locke to justify the Glorious Revolution of 1688. It was an axiom of revolutionary political opinion in eighteenth-century France, being popularized by Rousseau. It played its part in forming a revolutionary sentiment among the American colonies. The origin of the United States, therefore, goes back to feudal principles of government.

Id.

James Madison, in *The Federalist* No. 19, argued that federalism in its 1787 form, as exemplified in the Holy Roman Empire, owed much to the development of feudalism. THE FEDERALIST No. 19, at 117-23 (James Madison) (Jacob E. Cooke ed., 1961).

14. FORREST MCDONALD, E PLURIBUS UNUM: THE FORMATION OF THE AMERICAN REPUBLIC 192 (1965). "The creation of this federal system is undoubtedly the greatest original contribution of America to the art and science of government." SAMUEL E. MORISON & HENRY S. COMMAGER, THE GROWTH OF THE AMERICAN REPUBLIC 184 (1937).

History affords perhaps two dozen clear examples of federations or confederations prior to the founding of the United States of which James Madison apparently was familiar. Madison compared some of the early historical examples and their method of operation with the inadequacies of the Articles of Confederation. *Madison's Notes on the Federal Convention, in* THE CONSTITUTIONAL CONVENTION AND THE FORMATION OF THE UNION OF AMERICAN STATES 143, 152 (Winton Solberg ed., 1958). *The Federalist* is replete with references to ancient confederations and also contains a case by case analysis of various attempts at federative association. THE FEDERALIST Nos. 18, 19, 20, at 110-29 (James Madison) (Jacob E. Cooke ed., 1961).

15. Being constituted of constituent parts means that ultimate decision-making is not left to one constituent part of the government. In fact, the basic governmental decisions under the early American federal government were left to local governing bodies such as townships, counties and states. The early nineteenth century American governmental structure, as Tocqueville recognized, reflected the federalistic principle of localism. "[E]very village forms a sort of republic accustomed to conduct its own affairs." ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 3 (1841). Hence, the

Constitution "a limited constitution,"[16] viewing it as a limitation upon the emerging federal government; and imposed by the people and the constituent groups of the new government,[17] such as the individual states.[18]

Likewise, the third factor of comparison, religion, also embodies a distinction with contemporary America. In 1787 American religious affiliations, almost universally some denominational variant of Protestant Christianity, were homogenous.[19] Moreover, to the colonists, religion was not only a way of life but was life itself. In other words, an established religion was but a natural result of their faith.[20] Even though this sometimes resulted in repression of religious expression by members of

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Union, even after the Constitution became effective, was seen as pluralistic not national, which explains the absence of the term "national" in the Constitution. In fact, Madison's proposal to add the term "national" to the First Amendment was met with a rebuff from those in the First Congress which resulted in Madison withdrawing his proposal.

16. THE FEDERALIST No. 27 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

17. The framers knew very well that division of power among several governmental bodies would forestall consolidation of power. Instead, such a division of power tends to drive the system apart and minimize governmental power. Bryce noted:

> The American Federal Republic . . . is . . . a commonwealth as well as a union of commonwealths, because it claims directly the obedience of every citizen, and acts immediately upon him through its courts and executive officers. Still less are the minor communities, the states, mere subdivisions of the union, creatures of the national government, like the counties of England or the departments of France. They have over their citizens an authority which is their own, and not delegated by the central government. They have not been called into being by that government. They existed before it. They could exist without it.

JAMES BRYCE, THE AMERICAN COMMONWEALTH 13-14 (1891). In addition, Bryce notes: "America is a commonwealth of commonwealths, a Republic of republics, a state which, while one, is nevertheless composed of other states even more essential to its existence than it is to theirs." *Id.* at 12.

18. The new federal government created by the Constitution was limited in nature because its authority was not self-initiating but was derived from the Constitutions of the states. "In short, national or local governments, being the creatures of the states, could exercise only those powers explicitly or implicitly given them by the states; each state government could exercise all powers unless it was forbidden from doing so by the people of the state." MCDONALD, *supra* note 14, at 191. McDonald further notes: "In an ultimate sense, the Constitution confirmed the proposition that original power resided in the people—not, however, in the people as a whole, but in them in their capacity as people of the several states." *Id.*

19. LEO PFEFFER, GOD, CAESAR AND THE CONSTITUTION 5-8 (1975). It has been noted that Protestant Christianity was the principal religion in American life from 1620 until roughly 1920 and that Protestant Christianity has been the established American religion in some sense since the country's founding. *Id.* *See* PAUL KAUPER, CIVIL LIBERTIES AND THE CONSTITUTION 4 (1966). The prevalence of Protestant Christianity is reflected in men who signed the Constitution. Of the thirty-seven who signed, there were sixteen Episcopalians, six Presbyterians, five Congregationalists, three Quakers, two Methodists, one Lutheran—all Protestants—two Roman Catholics and two Deists. *See generally* M.E. BRADFORD, A WORTH COMPANY: BRIEF LIVES OF THE FRAMERS OF THE UNITED STATES CONSTITUTION (1982). For further discussion of the dominant position of Protestantism, see *infra* notes 67-76 and accompanying text.

20. Morris D. Forkosch, *Religion, Education, and the Constitution—A Middle Way*, 23 LOY. L. REV. 617, 626 (1977).

denominations not endorsed by a particular state.[21] Eighteenth century America was a period of established religions in the individual states[22] and the dominance of state endorsed Protestantism was reflected in court decisions throughout the latter half of the nineteenth century.[23] In contrast, contemporary America no longer abides under homogenous Protestantism. Instead, pluralism of belief permeates the religious arena.

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21. *Id.* at 626-27.

22. PFEFFER, *supra* note 19, at 13-15. Although the establishments were of different sects, they belonged to the same religious family tree, Protestant Christianity. This is due mainly to the fact that the original colonies were English, and their English settlers were primarily Protestant. The non-English minorities, the Scots, the Scotch-Irish, the French, the Dutch, the Swedes, the Germans, were also mostly Protestant. There were only a few Catholics, mostly in Maryland, and even fewer Jewish people. Forkosch notes:

> Despite the breath of fresh air which blew over the newly-created United States and states in 1787-1789, repression and conformity were still the rule. Only three states then permitted full religious freedom . . . six retained their religious establishments; two of the latter insisted upon Christianity, and five required that it be Protestantism; all had various other requirements and limitations.

Forkosch, *supra* note 20, at 632. "Until 1833 Massachusetts still supported a Protestant religion by public taxation, absence from church was a Massachusetts crime until 1836." Arthur E. Sutherland, Jr., *Establishment According to* Engel, 76 HARV. L. REV. 25, 28 (1962); *see also* Engel v. Vitale, 370 U.S. 421, 427-28 (1962) (discussing state establishment of churches in early America); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-3, at 1161 n.25 (2d ed. 1988); RICHARD E. MORGAN, THE SUPREME COURT AND RELIGION 30-31 (1972).

23. For example, in Lindenmuller v. People, 33 Barb. 548 (N.Y. 1861), a defendant was convicted for violating the Sabbath by staging a dramatic performance on Sunday. The court held that the act of the legislature punishing such conduct did not violate the New York constitutional provision granting free exercise of religion, since that provision granted toleration to all other religions, but still left Christianity unaffected as the people's religion. Since the State recognized the general Christianity of the people, it could preserve their customs from desecration. The reasoning in *Lindenmuller* is similar to that of Chief Justice James Kent in People v. Ruggles, 8 Johns R. 290 (N.Y. 1811). Ruggles was convicted for reviling the Christian religion. His conviction was upheld on the ground that by maliciously ridiculing Christ he had committed the common law crime of blasphemy, which still existed despite a New York constitutional provision allowing free exercise of religion. According to Kent, the free exercise provision did not prevent the courts from recognizing offenses against religion. Kent denied, however, the necessity to protect the religion of Mohamet or that of the grand Lama, since "the case assumes that we are a Christian people, and the morality of the country is deeply ingrafted upon Christianity, and not upon the doctrines or worship of those imposters." *Ruggles*, 8 Johns. R. at 295. Thus, *Lindenmuller* and *Ruggles* stand for the proposition that the State can recognize and specially protect the religion of the majority, while extending mere toleration to the worship of the minority. *See* Vidal v. Executors of Girard, 43 U.S. (2 How.) 127 (1844); Moore v. Monroe, 20 N.W. 475 (Iowa 1884); *see also* Note, *Nineteenth Century Judicial Thought Concerning Church-State Relations*, 40 MINN. L. REV. 672 (1956). Moreover, the judicial rationale for upholding the Christian orientation of the American people was evident in the Mormon cases. *See, e.g.*, Davis v. Beason, 133 U.S. 333 (1890); Reynolds v. United States, 98 U.S. 145 (1878). In *Davis*, the Court remarked:

> Probably never in the history of this country has it been seriously contended that the whole primitive power of the government for acts, recognized by the general consent of the Christian world in modern times as proper matters for prohibitory legislation, must be suspended in order that the tenets of a religious sect encouraging crime may be carried out without hindrance.

Davis, 133 U.S. at 342-43. For further discussion of *Reynolds* and *Davis*, see *infra* note 104.

From this cultural, political and religious matrix, the First Amendment and its religion clauses emerged. Also emanating from the matrix are various arguments regarding the objectives of the religion clauses. Many argue that the drafters of the First Amendment religion clauses were influenced by essentially three theories regarding the matter: the evangelical theory, the separatist theory and a combination of evangelical and separatist theory.[24]

Roger Williams and others espoused the evangelical theory, which considered the Establishment Clause of the First Amendment necessary to safeguard religious truth from the corrupting hand of government.[25] Williams had been banished from Massachusetts by the governing authorities for his opposition to the Sabbath laws.[26] Williams believed it was appropriate for government to affirmatively support religion where such state support could be provided without state control of religion.[27] He opposed state aid to churches that affected a church's right to control its religious purposes or that established a particular church.[28] The basic concern of Williams, and some who followed him, was preventing government restraint on the exercise of religion and to prevent government support from corrupting the church.[29] Since he died in 1683, some 106 years before the debates of the first Congress on the religion clauses, the influence of Williams on the Framers is questionable.

The second theory, best represented by the notions of Thomas Jefferson, is that separation of church and state is "the safeguard of public

24. TRIBE, *supra* note 22, § 14-3, at 1158-66; Jeanmarie S. Brock & Harvey G. Brown, Jr., Comment, *Government Noninvolvement with Religious Institutions*, 59 TEX. L. REV. 921, 926-30 (1981) (echoing TRIBE's veiwpoint); Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1057-60 (1978). This article's purpose is not to debate these competing theories, but rather to argue that any reliance on history is misplaced. Consequently, it will explain briefly and somewhat simplistically these various models. Other commentators have examined at length the merits of each theory. These scholars can be divided into two camps: strict separationists and nonpreferentialists. Nonpreferentialists, closely akin to the Roger Williams school of thought, hold the belief that the religion clauses were designed to foster a spirit of accommodation and cooperation between religion and state. DANIEL L. DREISBACH, REAL THREAT AND MERE SHADOW: RELIGIOUS LIBERTY AND THE FIRST AMENDMENT 54 (1987); MARK DEWOLFE HOWE, THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY (1965). The strict separationists, on the other hand, adhere to the Jeffersonian school of thought, believing that the wall between church and state remain virtually impenetrable. *See generally* THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT (1986); LEONARD LEVY, THE ESTABLISHMENT CLAUSE (1986).

25. HOWE, *supra* note 24, at 19. *See also* PERRY MILLER, ROGER WILLIAMS: HIS CONTRIBUTION TO THE AMERICAN TRADITION 89, 98 (1953).

26. AMERICAN STATE PAPERS ON FREEDOM OF RELIGION 57 (William Blakely ed., 1943).

27. Robley E. Whitson, *American Pluralism*, *in* 37 THOUGHT 492, 497-500 (1962).

28. Wilber G. Katz, *Radiations from Church Tax Exemption*, 1970 SUP. CT. REV. 93, 97.

29. *Id.*

and private interests against ecclesiastical depredations and excursions."[30] Thus, it has been said that:

> Thomas Jefferson . . . saw separation as a means of protecting the state from the church. As early as 1779, he presented a bill to the Virginia Legislature to disestablish the tax-supported Anglican church. . . . [I]t was Jefferson's conviction that only the complete separation from politics would eliminate the formal influence of religious institutions and provide for a free choice among political views; he therefore urged the strictest 'wall of separation between church and state.'[31]

Jefferson, however, was not the strict separationist some have claimed.[32]

The third theory, often attributed to James Madison, reflects a compromise view: both religion and government benefit by diffusing power to assure competition among sects rather than dominance by any one.[33] James Madison believed that both religion and government could best achieve their respective purposes if each were left free from the other within their respective spheres.[34] To Madison the separation of church

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30. HOWE, *supra* note 24, at 2. ROBERT T. HANDY, A CHRISTIAN AMERICA: PROTESTANT HOPES AND HISTORICAL REALITIES 20 (2d ed. 1984). Professor Howe notes that Jefferson's viewpoint reflects "both the skepticism and the confidence of the Enlightenment." HOWE, *supra* note 24, at 7.

31. TRIBE, *supra* note 22, § 14-3, at 1159 (footnote omitted). *See also* Everson v. Board of Educ., 330 U.S. 1, 16 (1947) (discussing Jefferson's wall of separation). While President, Jefferson replied by letter dated January 1, 1802, to a Committee of the Danbury Association of Connecticut, referring to the purpose of the religion clauses as building "a wall of separation between Church and State." 4 MALONE, *supra* note 8, at 108-09. This letter has been heralded by the Supreme Court "almost as an authoritative declaration of the scope and effect of the amendment thus secured." Reynolds v. United States, 98 U.S. 145, 164 (1878).

32. *See* Donald A. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part II, The Nonestablishment Principle*, 81 HARV. L. REV. 513, 514 (1968) (labelling Jefferson a strict separationist). Again, this is a simplistic characterization. For example, Jefferson was the founder of the University of Virginia. From its inception in 1819, the school has been wholly governed, managed and controlled by the State of Virginia. In his annual report as Rector to the President of the University of Virginia, dated October 7, 1822, Jefferson set forth his recommendation in detail that students be allowed to meet on the campus to pray and worship together or, if need be, to meet and pray with their professors on campus. *See* 19 WRITINGS OF THOMAS JEFFERSON 414-17 (1904). Jefferson's suggestions were adopted by the University, and regulations were drafted by the University pursuant to Jefferson's views. *See* II REGULATIONS OF THE UNIVERSITY § 1 (Oct. 4, 1982). Jefferson, thus, was not opposed to religious worship and study being conducted on the premises of the University of Virginia. To the contrary, he accepted it as being within constitutional parameters.

It is also interesting to note that when Congress initially authorized the public schools for the nation's capital, the first president of the school board was Jefferson himself. J. O. Wilson, *Public Schools of Washington*, 1 REC. C. HIST. SOC. 4 (1897). In fact, he "was the chief author of the first plan of public education adopted for the City of Washington." *Id.* at 5. The first official report on file indicates that the Bible and the Watts Hymnal were the principal, if not the only, books then in use for reading by the public school student. *Id.* at 9.

33. TRIBE, *supra* note 22, § 14-3, at 1159; Robert C. Casad, *The Establishment Clause and Ecumenical Movement*, 62 MICH. L. REV. 419, 421 (1964).

34. Madison urged that the

> tendency to a usurpation on one side or the other, or to a corrupting coalition or alliance

and state formed "the great barrier against usurpations on the rights of conscience . . . [s]o long as it is respected . . . ."[35]

Unfortunately, none of these theories fully account for the political and religious climate of America in 1789 which leads to misconceptions in modern interpretation of the objectives of the religion clauses.[36] The theories are inaccurate insofar as they assume substantial disagreement among the Framers concerning the respective roles of church and state in the emerging federalist nation. In fact, the Framers were united in their intent to create a political structure assuring continuity for the newly formed Union while leaving jurisdiction to the states over their own concerns, religion being one such concern.[37]

Moreover, while Williams, Jefferson, and Madison sought separation of church and state, none were anti-religious as asserted by various scholars.[38] Rather, they were seeking to institutionalize a toleration for the exercise of all religions obviously absent in some of the states.[39] These men did not seek a complete separation of religion from the state because such a concept was foreign to the cultural and religious environment of the period.[40]

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between them, will be best guarded against by an entire abstinance [sic] of the Government from interference in any way whatever, beyond the necessity of preserving public order, and protecting each sect against trespass on its legal rights by others.

9 THE WRITINGS OF JAMES MADISON 487 (Gaillard Hunt ed., 1910).

35. 2 THE WRITINGS OF JAMES MADISON 185 (Gaillard Hunt ed., 1910).

36. *See supra* notes 11-23 and accompanying text. Professor Tribe states: "Surely, the Framers did not dream of a society as pervasively regulated by the state as is ours. To ignore this fact and rigidly adhere to views characteristic of the Framers could gravely imperil the freedoms sought by the two religion clauses." TRIBE, *supra* note 22, § 14-3, at 1158 n.5. However, one must be academically honest. This means reviewing and analyzing the historical background of the subject at hand (i.e., the religion clauses). Moreover, after such an analysis, the historical record is not so ambiguous as has been supposed. *Id.*

37. *See infra* notes 11-18 and accompanying text. It has been noted: "The founding fathers were assuming a government of highly limited powers. They expected religion to play a part in the established social order, but also expected the state to play a minimal role in forming that order." Giannella, *supra* note 32, at 514; *see* Joel F. Hansen, Comment, *Jefferson and the Church-State Wall: A Historical Examination of the Man and the Metaphor*, 1978 B.Y.U. L. REV. 645.

38. For example, in the winter of 1804-05 (during his first term in the White House) Jefferson began the task of writing his own description of the life and teachings of Jesus Christ. In 1816 his compilation was completed, entitled "The Life and Morals of Jesus of Nazareth." *See generally* THOMAS JEFFERSON, THE LIFE AND MORALS OF JESUS OF NAZARETH (1940). *See also* BRODIE, *supra* note 8, at 373 (writing that Jefferson published the work to prove that he was a real Christian). Jefferson referred to Christ's system of morals as "the most perfect and sublime that has ever been taught by man." Letter to Dr. Benjamin Rush from Thomas Jefferson (Apr. 21, 1803) *in* THOMAS JEFFERSON: WRITINGS 1125 (Merrill D. Peterson ed., 1984). He even envisioned his "Bible" as a "useful tool for enlightening the Indians about Christianity." BRODIE, *supra* note 8, at 372.

39. Forkosch, *supra* note 20, at 632.

40. Concerning the mind frame of the constitutional era and the drive toward separation of church and state, Forkosch writes: "Perhaps the approach was, in some respects, anti-clerical, as a result of Papism, Cromwellism, etc., but never anti-religious, so that some interrelating and intermeshing of the state and religion have always been with us." *Id.*

While the development and history of the religion clauses provided the Supreme Court with a variety of theories for its Establishment Clause jurisprudence,[41] the Court has followed most closely the theory of strict separation.[42] This may be seen in the Court's first expansive Establishment Clause decision, *Everson v. Board of Education*,[43] where it stated:

> The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'[44]

As evidenced by the reference to Thomas Jefferson, the *Everson* Court framed its construction of the Establishment Clause upon its purported understanding of First Amendment history. This reliance upon historical perspective is apparent even in more recent Court decisions.[45]

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41. *See, e.g.*, Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987) (adhering to a Williamsonian paternal approach that favored separation for the benefit of religion); Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976); Walz v. Tax Comm'n, 397 U.S. 664 (1970) (using a Madisonian approach in holding that the Establishment Clause requires the state to maintain a benevolent neutrality toward religion); McCollum v. Board of Educ., 333 U.S. 203 (1948) (implementing a strict separationist approach); Everson v. Board of Educ., 330 U.S. 1 (1947). For further discussion of *Everson*, see *infra* notes 43-44 and accompanying text.

42. DONALD L. DRAKEMAN, CHURCH-STATE CONSTITUTIONAL ISSUES 8 (1991).

43. 330 U.S. 1 (1947). The controversy in *Everson* centered on a taxpayer's challenge of a New Jersey statute authorizing reimbursement to parents for transportation costs of children attending sectarian schools. Despite its strict separation rhetoric the Court upheld the statute as constitutional. The Court found that the state plan did not support religion, but rather served a public purpose. *Id.* at 17-18. The Court paralleled the reimbursement with a state-paid policeman who protects children travelling to and from church schools from traffic mishaps, stating that both could be provided free of charge if the state felt that it was in the best interest of the child. *Id.* at 17.

44. *Id.* at 15-16 (quoting Reynolds v. United States, 98 U.S. 145, 164 (1879)). The often quoted Jefferson passage states: "I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion or prohibiting the free exercise thereof,' thus building a wall of separation between church and state." HOWE, *supra* note 24, at 1 (quoting 16 WRITINGS OF THOMAS JEFFERSON 281-82 (1903)).

45. *See, e.g.*, Lee v. Weisman, 112 S. Ct. 2649, 2668-70, 2673-76 (1992) (Souter, J., concurring); *id.* at 2679-81 (Scalia, J., dissenting); Allegheny v. ACLU, 492 U.S. 573, 655-79 (1989) (Kennedy, J.,

Such reliance is troublesome because, as discussed earlier, the historical context of the religion clauses is dramatically different than the context of contemporary Establishment Clause issues. Imposition of historical concerns regarding state churches upon contemporary religious expression by individuals is no longer workable. The nation is no longer under the dominant influence of homogenous Protestantism and state-established Protestant churches. Contemporary American religious and cultural diversity precludes any serious threat of a government-established "church" that Jefferson and others feared.[46] Accordingly, if its religion clause jurisprudence is to be credible and effective, the Supreme Court must reexamine and revise its analytical framework.

III. RELIGION IN AMERICA: AN EVOLUTION TOWARD DIVERSITY

In 1952 the Supreme Court unequivocally acknowledged that America is composed of "religious people."[47] While this fact has been true from the founding era through recent times,[48] the religious composition of America is now diverse and becoming even more so. For instance, colonial America was a nation of religious diversity although the diversity existed within the boundaries of shared Protestantism.[49] Contemporary America, on the other hand, is represented by religious diversity that includes not only the Protestantism of colonial America with its diverse denominations but also a myriad of other belief systems.[50]

The evolution of American religious demographics has had four distinct periods: (1) the founding era, when churches were established by the colonies and later by some of the states; (2) the late eighteenth century and the mid-nineteenth century, when the state disestablished religion but maintained the informal establishment of Protestant churches; (3) late nineteenth century, when religious diversity increased and Protestant influence began to decline; and (4) contemporary America, where

concurring in part & dissenting in part); Wallace v. Jaffree, 472 U.S. 38, 91 (1985) (Rehnquist, J., dissenting); *Walz*, 397 U.S. at 664.

46. See *supra* notes 30-32 and accompanying text for a discussion of Jefferson's fears.

47. *See* Zorach v. Clauson, 343 U.S. 306, 313 (1952).

48. WINTHROP S. HUDSON, RELIGION IN AMERICA 398-402 (4th ed. 1987) (discussing poll results demonstrating that Americans believe churches contribute to the prosperity of the nation).

49. *Id.* at 3. For example with the exception of small groups of Catholics and Jews, the majority of the early colonists were Protestant. *See infra* notes 52-57 and accompanying text discussing the heterogeneous Protestant population.

50. HUDSON, *supra* note 48, at 3. Today, many Americans classify themselves as Protestants, but a strong number profess beliefs consistent with Islam, Hinduism, Jehovah's Witnesses, Buddhism, and atheism. Recent figures testify to the current religious diversity in America; that is, there are 239 officially recognized religious sects and 1,300 unconventional groups today. *See* note 113 and accompanying text.

religious diversity is increasing and institutionalized religion has little real influence on society or government.[51]

Respect for religion reached its zenith during the settling of the New World and the founding of the New Republic. Members of various religious denominations viewed the New World as a haven for religious freedom.[52] Unlike the Spanish and French governments which advocated and forced religious unity in their colonies, the English government adhered explicitly to a policy of religious toleration in the American colonies.[53] In fact, the English government used this promise of religious freedom to attract colonial adventurers,[54] and certain religious sects even established their own colonies. For example, the majority of settlers in early Virginia were Anglican, and Congregationalists founded the colonies at Plymouth and Massachusetts Bay.[55] Other colonies, however, were more diverse. For example, North Carolina included Quakers, Baptists, Presbyterians, Moravians, and Lutherans.[56] Pennsylvania also attracted a wide variety of religious sects such as Quakers, Presbyterians, and several German groups such as the Mennonites and Moravians.[57]

Thus, at the beginning of the American Revolutionary War, at least eight of the thirteen colonies recognized official churches.[58] Georgia, Maryland, North Carolina, South Carolina, and Virginia officially preferred Anglicanism,[59] and three states officially recognized Congregationalism.[60] In addition, New York officially supported Protestantism.[61]

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51. HUDSON, *supra* note 48, at 3-4.

52. CURRY, *supra* note 24, at 3. For example, the Pilgrims fled England and then the Netherlands where they suffered persecution and sought religious freedom in the New World. *See* MARTIN E. MARTY, PILGRIMS IN THEIR OWN LAND: 500 YEARS OF RELIGION IN AMERICA 59-62 (1984). The Puritans "dreamed of a return to the primitive simplicity and innocence of the earliest Christian church and for this they need to be off by themselves." *Id.* at 62. So they journeyed to the colonies seeking a place to establish their new, pure church. *Id.* The desire to be free from the restraints of their home churches created an incentive for Mennonites and Moravians to come to the New World. HUDSON, *supra* note 48, at 23-24. These groups saw America as a place of new beginnings. *Id.*

53. HUDSON, *supra* note 48, at 17. But see *infra* notes 89-93 and accompanying text discussing the problems Catholics faced in the New World.

54. HUDSON, *supra* note 48, at 18.

55. *Id.* at 30.

56. *Id.* at 31.

57. *Id.* at 35-36, 53-58.

58. Engel v. Vitale, 370 U.S. 421, 427-28 (1962).

59. *Id.* at 428 n.10. *See generally* WILLIAM W. SWEET, THE STORY OF RELIGIONS IN AMERICA 274 (1930).

60. *Engel*, 370 U.S. at 428 n.10 (indicating that Connecticut, Massachusetts and New Hampshire officially recognized Congregationalism); SWEET, *supra* note 59, at 251.

61. SANFORD H. COBB, THE RISE OF LIBERTY 338-39, 408 (1970); James McClellan, *The Making and Unmaking of the Establishment Clause*, *in* A BLUEPRINT FOR JUDICIAL REFORM 300 (Patrick B. McGuigan & Randall R. Rader eds., 1981); *see* Jaffree v. Board of Sch. Comm'rs, 554 F. Supp. 1104, 1114 nn.6 & 8 (S.D. Ala.), *rev'd sub nom.* Jaffree v. Wallace, 705 F.2d 1526 (11th Cir. 1983), *aff'd,* Wallace v. Jaffree, 472 U.S. 38 (1985).

Even though Delaware, New Jersey,[62] Pennsylvania, and Rhode Island maintained "no establishment" policies,[63] they nonetheless "retained the Christian religion as the foundation stone of their social, civil, and political institutions."[64]

By the time the Bill of Rights was ratified in 1791, the role of religion in colonial America had entered its second phase. Ten of the fourteen states had adopted "no establishment" policies. But, establishment of "[an] informal or voluntary type, without legal or financial support by the government thrived"[65] and a "pattern of quasi-establishment or *de facto* plural establishment of Protestant Christianity over disbelievers and infidels persisted well into the nineteenth century."[66]

During the first two periods, American colonists appeared to be diverse in their religious beliefs, although in reality they were merely manifesting basic Protestantism in different ways.[67] Without question, the various religious groups were predominantly Protestant Christians.[68] Non-Protestant religious minorities such as Roman Catholic Christians and Jews coexisted, but their numbers and influence were insignificant.[69] For instance in 1800, one in fifteen Americans belonged to a Protestant church; and in 1835 church membership almost doubled in number, as one in eight Americans professed membership.[70] Although the Protestant churches failed to enroll a majority of Americans as official members, their leaders often spoke as if the moral direction of the nation as a whole was in their hands. They assumed that many who were not actually members were nevertheless part of their constituencies, or were at least in general sympathy with them.[71]

Protestant leaders, "[c]laiming that their nation's civilization was rooted in the premises of Protestant Christianity . . . aimed to make . . .

62. Several scholars have noted evidence of early religious establishment in New Jersey. *See* WILLIAM W. SWEET, RELIGION IN COLONIAL AMERICA 53 (1942); CARL ZOLLMANN, AMERICAN CHURCH LAW 3 (1933).

63. *See Engel*, 370 U.S. at 427-28 & n.10.

64. DREISBACH, *supra* note 24, at 77 (quoting *Jaffree*, 554 F. Supp. at 1114).

65. ROBERT T. HANDY, UNDERMINED ESTABLISHMENT: CHURCH-STATE RELATIONS IN AMERICA, 1880-1920, at 7 (1991).

66. DREISBACH, *supra* note 24, at 77-78.

67. *Id.* at 3; *see* HUDSON, *supra* note 48, at 3.

68. HUDSON, *supra* note 48, at 13.

69. *Id.*

70. HUDSON, *supra* note 48, at 125. The accuracy of these statistics is questionable because of the inconsistent definition of membership, but historians nevertheless concur that Protestant churches occupied "a conspicuous place in the life of the new nation." *Id.* at 126; *see, e.g.*, DE TOCQUEVILLE, *supra* note 15, at 30-32, 170-75.

71. HANDY, *supra* note 65, at 8-9; HUDSON, *supra* note 48, at 125.

civilization more fully Christian."[72] To achieve this goal, Protestant denominations formed voluntary associations and cooperated informally with government officials.[73] This Protestant unity was a manifestation of the common theology linking the various denominations.[74] As one prominent Protestant noted, while each evangelical denomination possesses its own peculiarities, it is erroneous to equate these peculiarities with the fundamentals of our common Christianity.[75] Another expressed the same view: "[T]he church of Christ is not under the Episcopal form, or the Baptist, the Methodist, the Presbyterian or the Congregational form exclusively; all are, for all intents and purposes, to be recognized as parts of the one holy catholic church."[76]

As the nineteenth century progressed, unity disappeared along with the unofficially established church of Protestantism, and America's religious composition began to change. This change was a result of primarily two events: the Civil War, which undermined the unified Protestant spirit,[77] and increased immigration from Europe, which resulted in new Americans with diverse religions and belief systems.[78]

As the Civil War approached, Protestants from the North and South differed over the proper moral direction of the nation and the idealism of creating a nation that could serve as an example to other countries seemed to be fading.[79] Slavery divided the churches and ultimately the nation, and the unifying spirit gradually began to vanish.[80] Subsequently, reconstruction failed to fully reunify the nation and reunification of the Protestant denominations largely failed along with it.[81] For example, after the Civil War the southern branches of several national denominations continued their course of independence and became isolated from the greater Protestant community.[82] The continuing divisiveness

72. HANDY, *supra* note 65, at 11; *see also* HOWE, *supra* note 24, at 62 (finding that churches usually assumed their mission included active participation in the formulation and fulfillment of moral principle).

73. HANDY, *supra* note 65, at 7; HUDSON, *supra* note 48, at 125, 143-50.

74. HUDSON, *supra* note 48, at 144.

75. *Id.* (quoting Sidney E. Mead, *The Rise of the Evangelical Ministry in America (1607 - 1850)*, *in* THE MINISTRY IN HISTORICAL PERSPECTIVES 223-34 (Richard Niebuhr & D.D. Williams eds., 1956)).

76. *Id.* (quoting Mead, *supra* note 75, at 222-23).

77. *See infra* notes 79-83 and accompanying text.

78. *See infra* notes 84-101 and accompanying text.

79. HUDSON, *supra* note 48, at 199; JOHN E. SEMONCHE, RELIGION AND CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 32-33 (1985).

80. HUDSON, *supra* note 48, at 199.

81. *Id.* at 205.

82. *Id.* at 207.

furthered the decline of the influence of the *de facto* established Protestant church.[83] No longer did Protestant denominations across the nation view themselves as part of the larger "holy catholic church" with the common goal of providing America's moral direction. Rather, the various denominations were content to pursue their discrete agendas.

As the Civil War destroyed Protestant unity, the great numbers of immigrants in the 1800s diluted the influence of Protestantism as well.[84] Between 1865 and 1900, at least 13.5 million immigrants arrived in the United States and during the first decade of the twentieth century, another nine million emigrated.[85] These immigrants represented a wide variety of ethnic groups—German, Irish, Italian, Pole, Croatian, Czech, Hungarian, Greek, Russian, and Rumanian.[86] Many professed religious beliefs different than traditional Protestantism.[87]

Catholic and Jewish populations also grew during this period, and the influence of these religious groups shifted from that of small, insignificant religious minorities to one of substance and power.[88] While Catholics were represented in America's colonies,[89] English anti-Catholic sentiments were exported to the colonies, and the English government passed various laws intended to prevent the growth of Catholicism in the colonies.[90] Although the American Revolution did not eliminate all prejudices among the colonists, the common goal of independence united Catholics and Protestants to some degree and at least attenuated the fear of further laws biased against Catholics.[91] After the Revolution, the incipient disestablishment of Protestant state churches permitted Catholics to enjoy "a sense of belonging to and being an integral part of the new nation."[92] Nonetheless, Catholics remained a small religious minority, generally overshadowed by Protestant churches. In 1820 with only 124 churches, less than any individual Protestant denomination, the American Catholic church "was still a missionary outpost equal in significance to a small diocese in Europe and surpassed in importance by the church in Canada and Cuba."[93]

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83. *Id.* at 199.
84. DRAKEMAN, *supra* note 42, at 85.
85. HUDSON, *supra* note 48, at 224.
86. *Id.*
87. *Id.* at 225.
88. *See infra* notes 94-95, 97-101 and accompanying text.
89. JAY P. DOLAN, THE AMERICAN CATHOLIC EXPERIENCE 72 (1985). Indeed, Catholics even established an entire colony. *Id.*
90. *Id.* at 84; HUDSON, *supra* note 48, at 32.
91. DOLAN, *supra* note 89, at 96-97, 102.
92. *Id.* at 102.
93. *Id.* at 160.

However, immigration in the 1800s dramatically increased the Catholic population in America and only thirty years later, Catholicism became the largest denomination in the nation.[94] Specifically, prior to 1900, membership in the Roman Catholic church doubled.[95]

Judaism also grew during the nineteenth century and early twentieth century. Although the first Jewish settlers arrived around 1654, there were even fewer Jews than Catholics in early America.[96] For example, in 1825 only six active Jewish congregations existed in the United States.[97] By 1848, the number had increased to fifty.[98] In 1880 only 250,000 Jews, most of whom were Reform Jews of German ancestry scattered throughout the nation, lived in the United States.[99] According to one source, the Jewish population increased to one million between 1880 and 1900; another source indicates than 1.5 million Jews, most of which were orthodox, emigrated from Eastern Europe during the period of 1880 to 1914.[100] By 1914, the Jewish population exceeded three million.[101]

This emergence of other religious sects contributed to the shift from the appearance of religious diversity of the founding era to actual religious diversity which currently exists in the United States. For example, Mormons after a long struggle gained some prominence in America.[102] In its early years the polygamy practiced by the Church of the Latter-Day Saints created a great deal of friction between the church, the government, and Protestants.[103] For example, Mormon defiance of a federal law prohibiting polygamy resulted in litigation that ultimately reached the Supreme Court. After two unfavorable Court rulings,[104] the Mormon church abandoned polygamy and it became "increasingly evident that the distinctive boundary that had decisively separated more than

94. *Id.* at 161.

95. *Id.* at 17. During the first half of the nineteenth century, the Irish and the Germans represented the largest groups of Catholic immigrants, the majority of which brought their families with them. *Id.* at 128-31. As the end of the century approached, however, the origins of the Catholic immigrant changed. Italians, Poles, French Canadians, and Mexicans arrived in the country in record numbers. *Id.* at 131-36. These six ethnic groups comprised at least seventy-five percent of the American Catholic population. *Id.* at 134-35.

96. HUDSON, *supra* note 48, at 307.

97. *Id.* at 307.

98. *Id.*

99. *Id.* at 309.

100. *Id.* at 69.

101. *Id.* at 309.

102. *Id.* at 30-36.

103. *Id.* at 32-34.

104. *See, e.g.*, Davis v. Beason, 133 U.S. 333 (1890); Reynolds v. United States, 98 U.S. 145 (1878) (upholding law making polygamy a crime).

two hundred thousand Latter-Day Saints from the main patterns of American culture had been removed."[105] Thus, the growing influence and presence at the turn of the twentieth century of Jews and Catholics, as well as the emergence of lesser well known religious sects, diminished the importance of Protestantism as the nation's moral yardstick.[106]

In fact, since the end of World War II religion in America has become increasingly diversified. In 1960 Protestant churches reported 64,000,000 members; the Catholic church reported 42,000,000 members; and the number of Jews was reported to total 5,500,000.[107] However, these statistics do not describe the divisions within these groups, or the large numbers of adherents to other religions such as Islam, Hinduism, and Buddhism.[108] For example, current figures indicate there are 239 officially recognized religious sects and 1300 "unconventional" groups in the United States.[109]

Thus, America's religious demographics are in a state of flux, bearing no resemblance to the religious landscape existing at the writing of the Establishment Clause. America is now a nation composed of a wide variety of religious groups, none of which remotely pose a threat to religion or the state that the Framers faced.

IV. A GOVERNMENT OF LIMITED POWERS?

A transformation perhaps more dramatic than America's evolution of religious character is the evolution of the American federal government. The size and power of the federal government, and the nature of the contemporary state in relation to Establishment Clause concerns, are wholly different from that of the government in colonial America.

Accordingly, strict reliance on historical analysis in Establishment Clause cases is inappropriate, and the use of a Jeffersonian-strict separationist model is particularly inappropriate. As noted earlier, the Jeffersonian view assumes that the state requires protection from what Jefferson considered to be the powerful and corrupting influence of religious institutions.[110] The religious diversity of contemporary America coupled

105. HANDY, *supra* note 65, at 35.
106. *Id.* at 35-37.
107. HUDSON, *supra* note 48, at 329.
108. *Id.* at 330-31.
109. Henry J. Abraham, *Religion, the Constitution, the Court and Society: Some Contemporary Reflections on Mandates, Words, Human Beings, and the Art of the Possible, in* HOW DOES THE CONSTITUTION PROTECT RELIGIOUS FREEDOM? 15-17 (Robert A. Goldwine & Art Kaufman eds., 1987).
110. HOWE, *supra* note 24, at 2.

with the burgeoning federal, state and local government render any realization of Jefferson's fears improbable.

As noted earlier, the Framers of America's governing documents created a federalist system of enumerated and limited powers.[111] They designed the Constitution "to break up and counterpoise governmental decision and enforcement authority, not only between the national government and the states but among the three departments of the national government as well."[112] The modern American state bears little resemblance to America's early federalist system.

For example, the Supreme Court's expansion of governmental powers enumerated in the Constitution led to significant federal involvement with commerce. Prior to the Civil War, controversy over the expansion of federal powers apparently centered on whether Congress possessed power to create a national bank.[113] This led to the Supreme Court's landmark decision in *McCulloch v. Maryland*,[114] holding that the Constitution provided Congress the authority to establish a national bank under the Necessary and Proper Clause.[115] However, during this pre-Civil War period, Congress and the Court made little use of the Commerce Clause; the constitutional provision that would later be used to justify a virtually unrestrained expansion of congressional power.[116]

After the Civil War, Congress adopted a new view of its role in society. During the period of Reconstruction, the nation entered a period of great industrial growth[117] and, as the American economy became more

111. *See* U.S. CONST. art. I, § 8 (detailing congressional powers). In *The Federalist* No. 45, James Madison articulates the classic formulation of these principles:

> The powers delegated by the proposed Constitution to the Federal Government, are *few and defined*. Those which are to remain in the State Governments are *numerous and indefinite*. The former will be exercised principally on external objects, as war, peace, negociation [sic], and foreign commerce; with which last the power of taxation will for the most part be connected. The powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State.

THE FEDERALIST No. 45, at 313 (James Madison) (Jacob E. Cooke ed., 1961) (emphasis added).

112. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 80 (1980).

113. *See* JEFFERSON POWELL, LANGUAGES OF POWER: A SOURCE BOOK ON EARLY AMERICAN CONSTITUTIONAL HISTORY 37-54 (1991).

114. 17 U.S. (4 Wheat.) 316 (1819).

115. *Id.* at 404-25.

116. U.S. CONST. art. I, § 8, cl. 3. The Clause reads: "The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." *Id.*

117. Robert Harrison, *The 'Weakened Spring of Government' Revisited: The Growth of Federal Power in the Late Nineteenth Century, in* THE GROWTH OF FEDERAL POWER IN AMERICAN HISTORY 65 (1983); JOHN WHITECLAY CHAMBERS II, THE TYRANNY OF CHANGE: AMERICA IN THE

complex, commercial conflicts of national scope began to arise. Reformers decried the widening chasm between the wealthy and the poor; and tension increased between those with capital and those who labored, as well as between competing businesses.[118] Americans became apprehensive of monopolies and unrestrained commercial power. Nineteenth century congressmen "clearly believed that there was widespread public support for regulation, a general desire . . . that Congress should exercise its unquestioned power over interstate commerce."[119] The emergence of a national economy now justified use of the Commerce Clause as the constitutional basis for unprecedented governmental intervention into private business.[120] Congressional enactment of the Interstate Commerce Act in 1887 and the Sherman Antitrust Act in 1890 were the legislative green lights for such governmental intervention.[121] This and similar legislation led to litigation disputing their constitutionality, much of which was finally decided by the Supreme Court.[122]

The Court initially construed the Commerce Clause narrowly and struck down laws that affected commercial acts such as manufacturing.[123] Federal as well as state regulations on commerce briefly met judicial resistance in the late nineteenth and early twentieth centuries, and private property rights were protected from government regulation.[124]

This era of substantive economic due process was short-lived, for the Court soon removed economic rights from the protection of the Constitution. The Court's initial decisions regarding challenges to key portions of Roosevelt's New Deal legislation, enacted to stimulate the economy and to move the United States out of the Great Depression, did not signal a conclusive understanding of the issues.[125] Thus, while the Court's

PROGRESSIVE ERA, 1900-1917, at 84 (1980); JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 7 (1938).

118. Harrison, *supra* note 117, at 65.

119. *Id.* at 66.

120. *Id.* at 62-63.

121. *Id.* at 67.

122. *See, e.g.*, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); Carter v. Carter Coal Co., 298 U.S. 238 (1936); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Stafford v. Wallace, 258 U.S. 495 (1922); Hammer v. Dagenhart, 247 U.S. 251 (1918); Houston, E. & W. Tex. Ry. v. United States, 234 U.S. 342 (1914); Champion v. Ames, 188 U.S. 321 (1903); United States v. E.C. Knight Co., 156 U.S. 1 (1895).

123. *See, e.g., E.C. Knight*, 156 U.S. at 17-18.

124. During this era, known as the *Lochner* Era, the Supreme Court explicitly acknowledged the existence of substantive economic due process rights. *See, e.g.*, Lochner v. New York, 198 U.S. 45, 53, 64 (1905); *see* Stephen A. Siegel, Lochner *Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1, 3 (1991).

125. *See* Norman v. Baltimore & Ohio R.R., 294 U.S. 240 (1935); Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935); Nebbia v. New York, 291 U.S. 502 (1934); Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934).

early decisions consistently invalidated portions of Roosevelt's New Deal,[126] the Court subsequently began to uphold congressional enactments in this arena.[127]

Once the Court's broad interpretations of the Commerce Clause authorized Congress to regulate business and industry, Congress created a vehicle to accomplish such regulation—the administrative agency.[128] Creation of the administrative agency enabled Congress to regulate most areas of life in the modern United States, for Congress may enact the regulations *and* create the agency to enforce them. As a practical matter, Congress has delegated much of its power[129] to unelected agents with the authority to enforce legislation through regulations of their design.[130] Although a few administrative agencies existed prior to the late nineteenth century,[131] such agencies now largely act as a fourth branch of the federal government.[132]

In addition to the expansion of government's powers to regulate commerce, government became increasingly involved in affecting America's social order. The Framers of the Constitution did not provide a role for government, at any level, in creating or maintaining America's

126. *See Carter*, 298 U.S. at 291; Railroad Retirement Bd. v. Alton R.R., 295 U.S. 330 (1935); *Schechter*, 295 U.S. at 495.

127. *See, e.g.*, Wickard v. Filburn, 317 U.S. 111, 128-29 (1942); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30-32 (1937).

128. *See* LANDIS, *supra* note 117, at 10-15 (discussing the landmark creation of the Interstate Commerce Commission to enforce the provisions of the Interstate Commerce Act).

129. Seemingly this delegation could violate the separation of powers provisions of the Constitution. To preclude impermissible delegatory legislation, the Court developed the nondelegation doctrine:

> [T]he nondelegation doctrine serves three important functions. First, and most abstractly, it ensures to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will. . . . Second, the doctrine guarantees that, to the extent Congress finds it necessary to delegate authority, it provides the recipient of that authority with an "intelligible principle" to guide the exercise of the delegated discretion. . . . Third, and derivative of the second, the doctrine ensures that courts charged with reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards.

Industrial Union Dept., AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 685-86 (1980) (Rehnquist, J., concurring) (citing Arizona v. California, 373 U.S. 546, 626 (1963) (Harlan, J., dissenting)). If Congress fails to provide the administrative agency with "an intelligible principle to which . . . to conform," the Court must strike down the act as an impermissible delegation of congressional power. J.W. Hampton & Co. v. United States, 276 U.S. 394, 409 (1928). The Court, however, has invalidated only two cases based on this doctrine, thereby giving Congress leeway in establishing administrative bodies that possess tremendous discretion in enforcing the law. *Panama Ref. Co.*, 293 U.S. at 388; *Schechter*, 295 U.S. at 495.

130. LANDIS, *supra* note 117, at 23-24.

131. *Id.* at 10.

132. As Justice Jackson noted, the administrative bureaucracy, comprised of such agencies as the FCC, FTC, and FDA, "have become a veritable fourth branch of the Government." FTC v. Ruberoid Co., 343 U.S. 470, 487 (1952) (Jackson, J., dissenting).

social order. While the Framers "expected religion to play a part in the established social order, [they] also expected the state to play a minimal role in forming that order. In their view, the state was to maintain the public peace and security so that individuals and groups would be free to shape their own destinies."[133] Thus, the second major difference between colonial federalism and the modern American state is the extent of involvement of contemporary government with the social order of America. As one scholar notes: "[T]he state has undertaken [a] more positive role of allocating resources and actively structuring the social order."[134]

For example, Congress often has used its power under the Commerce Clause to regulate social values. Thus, in 1895 Congress passed the Federal Lottery Act prohibiting the interstate transportation of lottery tickets.[135] Court approval of the Act occurred in *Champion v. Ames*[136] where the Supreme Court stated:

> [W]e know of no authority in the courts to hold that the means thus devised are not appropriate and necessary to protect the country at large against a species of interstate commerce which, although in general use and somewhat favored in both national and state legislation in the early history of the country, has grown into disrepute and has become offensive to the entire people of the Nation.[137]

In other instances, Congress sought to regulate prostitution and attack racial segregation. In both attempts, the Court upheld Congressional action.[138] In upholding such efforts, the Court has held that Congress may "[deal] with what it consider[s] a moral problem."[139]

In addition, Congress has assumed responsibility for public education in America. The Framers, particularly Thomas Jefferson,[140] emphasized the importance of an educated citizenry, yet this task was not a power enumerated for the federal government. In colonial America, citizens, and in particular Protestant churches, were primarily responsible for education:[141] "[T]he primary purpose of [seventeenth century] education was to maintain Protestant religious beliefs and ensure social

133. Giannella, *supra* note 32, at 514.
134. *Id.* at 514-15.
135. Champion v. Ames, 188 U.S. 321, 321 (1903) (citing 28 Stat. 963 (1895)).
136. *Id.*
137. *Id.* at 358.
138. *See* Hoke v. United States, 227 U.S. 308, 322-23 (1913) (upholding federal legislation prohibiting the transportation of women across state lines for purposes of prostitution).
139. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 257 (1964).
140. *See, e.g.*, Letter to George Wythe from Thomas Jefferson (Aug. 13, 1786), *in* THOMAS JEFFERSON: WRITINGS 857-60 (Merril D. Patterson ed., 1984).
141. JOEL SPRING, THE AMERICAN SCHOOL: 1642-1985, at 1 (1986).

stability."[142]

It was not until the 1830s and 1840s that the modern public school system began to emerge.[143] Early public schools, the "common schools," were remarkably different from their non-public predecessors, undoubtedly due to efforts to promote national unity. Common schools were designed to educate all children, regardless of class, religion, or ethnicity.[144] Many hoped the common schools would be a "panacea for society's problems."[145]

By the late nineteenth century, an influx of public administrators and professional managers into the public schools signaled the emergence of educational bureaucracy.[146] In fact, "state supervision and organization became a major educational reform,"[147] and state agencies were created in order to implement such reforms.[148]

In the twentieth century, significant involvement of the federal government in public education is to a large degree *fait accompli*. The government has assumed responsibility for assuring, for example, that America's children receive equal educational opportunities.[149] As the Court said in *Brown v. Board of Education*: "Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. . . . It is the very foundation of good citizenship."[150] The Court's statement confirms, as one commentator observes, the transformation of public schools "from instruments of religion into instruments of the state."[151]

Thus, the state the Framers sought to restrain with the Establishment Clause is wholly different than the modern American state. At the time of the ratification of the Bill of Rights, state governments possessed

142. *Id.* at 70. As one prominent early educator stated:

> It is necessary to impose upon them [youth] the doctrines and discipline of a particular church. Man is naturally an ungovernable animal, and observations on particular societies and countries will teach us that when we add the restraints of ecclesiastical to those of domestic and civil government, we produce in him the highest degrees of order and virtue.

Id. at 33-34 (quoting Benjamin Rush, *Thoughts upon the Mode of Education Proper in a Republic, in* ESSAYS ON EDUCATION IN THE EARLY REPUBLIC 5 (Frederick Rudolph ed., 1965)).

143. *Id.* at 70.

144. *Id.* at 71.

145. *Id.*

146. *Id.* at 222-23.

147. *Id.* at 72.

148. *Id.*

149. Brown v. Board of Educ., 347 U.S. 483 (1954).

150. *Id.* at 493.

151. SPRING, *supra* note 141, at 1.

all powers not explicitly given to the newly established federal government. The authority of the established Protestant churches, *de facto* and *de jure*, paralleled that of the state governments. At that time, the Establishment Clause applied only to Congress and not to the states,[152] for it was not until the twentieth century that the Supreme Court extended the reach of the First Amendment religion clauses to the states.[153] Thus, the Establishment Clause has been applied today to a state that is altogether different than that of colonial America and that envisioned by the Framers of the First Amendment.

V. A PROPOSED REFORMATION FOR ONE ASPECT OF ESTABLISHMENT CLAUSE JURISPRUDENCE

Due to the changed landscape, history means little in today's complex relationship between religion and the modern American state. As discussed earlier, Thomas Jefferson, whose view has traditionally been the theoretical basis for the Supreme Court's decisions regarding such matters, believed that the government must be protected from "ecclesiastical depredations and excursions."[154] Yet, as also discussed earlier, the modern administrative "state" is wholly unlike the fledgling government Jefferson sought to protect and the "church" of the Framers' concerns no longer exists.

Thus, the Framers' concerns regarding the Establishment Clause are reversed in the sense individual liberties are presently at risk due to the burgeoning, centralized government. In fact, "[g]iven the reality of [the] modern administrative state, as government increases the scope of its activities, it must increasingly be sensitive to the interests of religious people in order to merely remain neutral."[155] Supreme Court Justice Kennedy, author of the majority opinion in *Weisman*, acknowledges this issue in *County of Allegheny v. American Civil Liberties Union*[156] where he states:

> In this century, as the modern administrative state expands to touch the lives of its citizens in such diverse ways and redirects their financial

152. The Establishment Clause reads: "*Congress* shall make no law respecting an establishment of religion . . . ." U.S. CONST. amend. I. (emphasis added).

153. *See* Everson v. Board of Educ., 330 U.S. 1, 14-15 (1947); Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940).

154. HOWE, *supra* note 24, at 2.

155. John W. Whitehead, *Accommodation and Equal Treatment of Religion: Federal Funding of Religiously-Affiliated Child Care Facilities*, 26 HARV. J. ON LEGIS. 573, 582 (1989) (quoting TRIBE, *supra* note 22, § 14-8, at 1204); Giannella, *supra* note 32, at 514-15.

156. 492 U.S. 573 (1989).

> choices through programs of its own, it is difficult to maintain the fiction that requiring government to avoid all assistance to religion can in fairness be viewed as serving the goal of neutrality.[157]

In this respect, the time is at hand to remove conflicts between Free Exercise rights and other First Amendment rights[158] from the scope of Establishment Clause analysis.

In response, one commentator suggests that in situations where the Free Exercise and Establishment Clauses conflict, "the Court should weigh the competing claims . . . against each other, and . . . the justices [should] put their collective thumbs on the side of free exercise. In other words, the free exercise claim should prevail unless the problem under the establishment clause is compelling."[159] The same principle should be applied to free speech interests implicit in most controversies involving religious expression in the public schools.

However, the scope of this article does not include consideration of all competing First Amendment interests. Rather, this article is concerned solely with the issue raised in *Weisman*: the conflict between freedom of speech and the Establishment Clause in the public education setting.

In the public educational setting, a framework must be realized that encapsulates the competing interests of free speech and Establishment Clause concerns. The traditional framework of *Lemon v. Kurtzman*,[160] or the revised analysis of *Weisman*, is wholly inappropriate due to its failure to analyze fully the competing interests. However, the framework proposed in this article resolves this concern.

First, courts must categorize the religious speaker whose rights are at issue. If the speaker is an outsider to the public school, two constitutional interests arise: free speech, because the speaker desires to engage in expressive activity, and the Establishment Clause, because granting or denying access to the forum is state action. In this situation, forum analysis is appropriate because it enables a court to consider these competing constitutional interests and provides an opportunity to balance them.

157. *Id.* at 657-58 (Kennedy, J., concurring in part & dissenting in part).

158. Examples of such conflicting claims include a variance between the Free Exercise Clause and the Establishment Clause, as in the case of a student attempting to distribute religious leaflets at school, and the Freedom of Association and the Establishment Clause, as in the case of a religious club wanting to meet at a public high school. The Supreme Court actually addressed the latter situation in Board of Education v. Mergens, 496 U.S. 226 (1990), and it used an Establishment Clause framework to make its decision. Under the proposed analysis of this article, the Court should have used a Free Speech analysis.

159. DRAKEMAN, *supra* note 42, at 117.

160. 403 U.S. 602 (1971).

On the other hand, if the speaker is a public school student, no balancing of interests is necessary: Student speech is not state action and Establishment Clause concerns are *de minimis*. In student speech situations, courts should make the evidentiary inquiry described in *Tinker v. Des Moines Independent Community School District*[161] rather than analyze the forum.

VI. OUTSIDE SPEAKERS AND RELIGIOUS SPEECH—MAINTAINING THE PROPER BALANCE WITH THE FORUM DOCTRINE

Although the First Amendment of the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech,"[162] this right is not absolute in all contexts. For example, in *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*,[163] the Supreme Court held: "Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities."[164]

While there are numerous ways for the state to restrict speech,[165]

161. 393 U.S. 503 (1969).

162. U.S. CONST. amend. I.

163. 473 U.S. 788 (1985).

164. *Id.* at 799-800.

165. Gary C. Leedes, *Pigeonholes in the Public Forum*, 20 U. RICH. L. REV. 499, 504 (1986). *See, e.g.*, Bishop v. Aronov, 926 F.2d 1066 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 3026 (1992) (prohibiting professor from discussing his religious views on subject matter during class and during an optional, voluntary class); Roberts v. Madigan, 921 F.2d 1047 (10th Cir. 1990), *cert. denied*, 112 S. Ct. 3025 (1992) (preventing elementary school teacher from reading Bible silently to himself during free reading period); Webster v. New Lenox Sch. Dist., 917 F.2d 1004 (7th Cir. 1990) (forbidding teacher to teach a creationist viewpoint); Slotterback v. Interboro Sch. Dist., 766 F. Supp. 280 (E.D. Pa. 1991) (involving school that attempted to preclude high school students from distributing religious literature).

Governmental entities have numerous, albeit limited, ways to restrict speech. First, the state could ban expression at a particular location. Leedes, *supra*, at 504-05. The ban could deny all individuals access rights to the platform or prohibit certain types of expression. *Id.* (indicating that while a broad ban is generally not discriminating, it is usually found to be unconstitutional and, in addition, the classification of the prohibition as a "total ban" and stating that case law intimates that "there is a rebuttable presumption that a total ban . . . is unconstitutional").

Second, the state might impose restrictions based on the content of the speaker's message. *Id.* at 506; *see, e.g.*, Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981) (invalidating city ordinance because it regulated billboards based on content); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) (city attempted to prohibit showing of drive-in movies based on content, otherwise known as content-based discrimination). Such a proscription precludes speech based on the viewpoint of the speaker. Leedes, *supra*, at 507. School officials have sought to deny use of school facilities after hours to groups because of the religious message they wanted to deliver. *See, e.g.*, Travis v. Owego-Apalachin Sch. Dist., 927 F.2d 688 (2d Cir. 1991); Gregoire v. Centennial Sch. Dist., 907 F.2d 1366 (3d Cir.), *cert. denied*, 111 S. Ct. 253 (1990). As the Supreme Court said:

[Generally, however] government may not grant the use of a forum to people whose views

the constitutionality of such restrictions turns on only one factor: the outcome of forum analysis. Despite criticism,[166] in recent years the Court has adhered to a forum analysis producing "results [which] often hinge almost entirely on the speaker's location."[167] In fact, the speaker's location is a means "of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes."[168]

A. *Classifying the Forum*

The first step in the forum analysis involves defining the forum.[169]

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it finds acceptable, but deny use to those wishing to express less favored or more controversial views. . . . There is an 'equality of status in the field of ideas,' and government must afford all points of view an equal opportunity to be heard.

Police Dept. of Chicago v. Mosley, 408 U.S. 92, 96 (1972) (footnote omitted).

The government may elect to engage in a more comprehensive ban on expression. For example, instead of prohibiting only the teaching of creationism, the school may seek to ban the teaching of all theories of how the world began. *See, e.g.*, Edwards v. Aguillard, 482 U.S. 578 (1987) (striking down school policy that provided that the consequence of not teaching creationism was prohibition of theory of evolution). Such a regulation is known as a subject matter proscription. Leedes, *supra*, at 507-08. Courts invariably will view suspiciously this type of discrimination. *Id.* at 509. Exceptions to this rule include the limiting of subject matter to issues a state actor may be dealing with at a specified location or to expression compatible with a governmental facility. *Id.* For example, prison officials may regulate the First Amendment rights of inmates. Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 129-33 (1977) (indicating that unrestricted freedom of expression is not compatible with the nature of and "legitimate operational considerations of the institution"). *Id.* at 130. Finally, the state may allow only certain types of speakers to express themselves in an area normally closed to any type of expression. Leedes, *supra*, at 510.

166. *See, e.g.*, Daniel A. Farber & John E. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219, 1222-24 (1984) (viewing the Court's use of a forum analysis as problematic because it ignores the fundamental issues underlying First Amendment speech cases).

167. *Id.* at 1220. Indeed, the Court's implementation of this approach is rather new. Prior to 1970, the Court had used the phrase "public forum" only twice. *Id.* at 1221-22. The doctrine has its origins in the dictum of Justice Roberts in Hague v. Committee for Industrial Organization, 307 U.S. 496 (1939). Professor Kalven elaborated on the concept in his seminal article, Harry Kalven, Jr., *The Concept of the Public Forum:* Cox v. Louisiana, 1965 SUP. CT. REV. 1. *See* Farber & Nowak, *supra* note 166, at 1221.

168. United States v. Kokinda, 110 S. Ct. 3115, 3119 (1990) (plurality opinion) (citing Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 800 (1985)).

169. *Cornelius*, 473 U.S. at 797. In the second step, the court applies the proper judicial standard to determine whether the state proscription is permissible. *Id.* Justice O'Connor, in her majority opinion in *Cornelius*, provided this approach to the forum analysis, but she also included a preliminary question: does the First Amendment in fact protect the expression at issue? *Id.*

Speech includes both written and verbal expression. It also encompasses symbolic speech. Texas v. Johnson, 491 U.S. 397 (1989) (holding flag-burning as protected speech). For example, in Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969), the Court classified wearing black armbands as a protest of the Vietnam Conflict as speech. *Id.* at 504-05. The Constitution also protects political speech as well as religious expression. The latter includes religious discussion and worship. Widmar v. Vincent, 454 U.S. 263, 269 (1981) (citing Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640 (1981); Niemotko v. Maryland, 340 U.S. 268 (1951); Saia v. New York, 334 U.S. 558 (1948)); Gregoire v. Centennial Sch. Dist., 907 F.2d 1366, 1370 (3d Cir.), *cert. denied*, 111 S. Ct. 253 (1990) (allowing an evangelical organization to

The Supreme Court has classified all forums, which include physical situs as well as "intangible channels of communication,"[170] into three categories: traditional public forums, designated public forums, and nonpublic forums.

1. Traditional Public Forums

The traditional public forum allows the state to regulate or proscribe speech only if its regulations are narrowly tailored to serve a compelling state interest and are not based upon content.[171] Traditional public forums include "places which by long tradition or by government fiat have been devoted to assembly and debate [or which] 'have immemorially been held in trust for the use of the public and have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.' "[172]

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use public school facilities for religious discussion). The Court also has characterized peaceful distribution of literature as protected speech. In addition, solicitation is viewed as protected speech. International Soc'y for Krishna Consciousness v. Lee, 112 S. Ct. 2701 (1992); *Cornelius*, 473 U.S. at 797; *Heffron*, 452 U.S. at 647.

170. Student Gov't Ass'n v. Board of Trustees, 868 F.2d 473, 476 (1st Cir. 1989) (citing *Cornelius*, 473 U.S. at 788; Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983)).

171. If the forum is categorized as a public or designated forum, see *infra* notes 179-82 and accompanying text, the restrictions must withstand strict scrutiny. In a strict scrutiny analysis, the government first must proffer evidence that its restriction or ban serves a compelling state interest. *Perry Educ. Ass'n*, 460 U.S. at 45; *see, e.g.*, Frisby v. Schultz, 487 U.S. 474 (1988) (ban on picketing in residential areas serves compelling state interest—protecting residential privacy); *see Cornelius*, 473 U.S. at 800; Leedes, *supra* note 165, at 501 (citing Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981); Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620 (1980)). In addition, the government must narrowly tailor its regulation or prohibition to further the state's interest. *Perry Educ. Ass'n*, 460 U.S. at 45; *Cornelius*, 473 U.S. at 800. An exclusionary policy "is narrowly tailored if it targets and eliminates no more than the exact source of 'evil' it seeks to remedy." *Frisby*, 487 U.S. at 485 (quoting City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 808 (1984)).

With respect to the limited public forum, the approach is somewhat different. Here, the state "is free to impose a blanket exclusion on certain types of speech, but once it allows expressive activities of a certain genre, it may not selectively deny access for other activities of that genre," Travis v. Owego-Apalachin Sch. Dist., 927 F.2d 688, 692 (2d Cir. 1991), without a compelling state interest or narrowly tailored regulation to further that goal. For example, in Gregoire v. Centennial School District, 907 F.2d 1366 (3d Cir.), *cert. denied*, 111 S. Ct. 253 (1990), the court held that when school officials "created an open forum for religious discussion in its evening classes and in the afternoon student activity period to which outsiders may be invited," they could not prevent such outsiders from using the facilities when the school was not operating. *Id.* at 1376-77 (emphasis omitted). The school, because it already had allowed expressive activity of religious nature, could not exclude other forms of that genre. *Id.*; *see also Travis*, 927 F.2d at 693 (school sought to prohibit Christian organization from using its facilities; however, because the school previously had allowed programs centering on religious expression to use the school, the school had created a limited public forum for speakers with religious themes). In situations where a school or school board has sought to circumscribe certain types of expression or speakers based on content or to ban all types of expression, the school or school board generally has the burden of proving the compelling state interest and narrowly tailored means. Slotterback v. Interboro Sch. Dist., 766 F. Supp. 280, 293. (E.D. Pa. 1991).

172. *Perry Educ. Ass'n*, 460 U.S. at 45.

Recently, in *International Society for Krishna Consciousness, Inc. v. Lee*[173] the Supreme Court elaborated on its definition of traditional public forums:[174] the forum's principal purpose must be the "free exchange of ideas."[175] The Court posed two inquiries in determining the purpose of the forum: First, the stated purpose of the property must be determined.[176] Second, the court must determine whether the forum has " 'immemorially . . . time out of mind' been held in the public trust and used for purposes of expressive activity."[177] While previous Court decisions have used the "time out of mind" standard, the Court's decision in *International Society for Krishna Consciousness, Inc. v. Lee* marks the

173. 112 S. Ct. 2701 (1992). *International Society for Krishna Consciousness* involved the challenge of a religious group to the Port Authority of New York's ban on solicitation and distribution of religious leaflets in the interior of the airport terminals. The Court addressed the solicitation and distribution issue in two separate cases, and concurring opinions common to both opinions are represented in a third case. With respect to the solicitation issue, six Justices found that the prohibition on solicitation within the airport was permissible. *See id.* In *International Society for Krishna Consciousness*, Chief Justice Rehnquist, joined by Justices White, O'Connor, Scalia, and Thomas, held that the airport was a nonpublic forum, *id.* at 2708, and that the airport restrictions satisfied the requirement of reasonableness. *Id.* at 2708-09.

Justice O'Connor concurred with the Court's reasoning, stating that she would uphold the ban because of the reasonableness of the restrictions. *Id.* at 2711-15 (O'Connor, J., concurring). Justice Kennedy, however, concurred only in the judgment. *See id.* at 2715-24 (Kennedy, J., concurring in judgment). Unlike the majority—including Justice O'Connor—Justice Kennedy found that the airport was a public rather than a nonpublic forum. *Id.* at 2715-20. Because of this classification, the restrictions must withstand strict scrutiny—narrowly tailored to serve a compelling state interest. *Id.* at 2720-24. Justice Kennedy, however, found that the restrictions on solicitation survived this stringent standard of review, and therefore, he voted to uphold that particular ban. *Id.*

Justices Souter, Blackmun, and Stevens, while agreeing with Justice Kennedy that the airport was a public forum, found that the solicitation restriction did not serve a compelling state interest. *Id.* at 2724-25 (Souter, J., dissenting).

With respect to the distribution issue, however, the Court reached a different result. In a per curiam opinion, a majority held that the ban on the distribution of literature was unconstitutional. *Id.* at 2709 (per curiam). Justices Kennedy, Souter, Blackmun, and Stevens found that the airport was a public forum and that the prohibition of distribution of literature could not withstand strict scrutiny. *Id.* at 2715-20 (Kennedy, J., concurring). Justice O'Connor, providing the fifth key vote, concurred in the judgment, holding that the airport was a nonpublic forum and that the proscription at issue did not satisfy a standard of reasonableness. *Id.* at 2711-15 (O'Connor, J., concurring in judgment). Chief Justice Rehnquist, along with Justices White, Scalia, and Thomas, dissented. *Id.* at 2710 (Rehnquist, C.J., dissenting).

In summary, a majority of the Court—Chief Justice Rehnquist and Justices White, O'Connor, Scalia, and Thomas—agreed that the airport constituted a nonpublic forum. For further discussion of the Court's public forum analysis, see *infra* notes 179-186 and accompanying text. The same Justices along with Justice Kennedy found that the restriction on solicitation inside airport terminals was constitutionally permissible. On the other hand, a majority of Justices—Justices Blackmun, Stevens, O'Connor, Kennedy, and Souter—concurred that the ban of distribution of literature was a violation of the First Amendment.

174. *Id.* at 2705-08.

175. *Id.* at 2706 (quoting Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788, 800 (1985)).

176. *Id.* This is erroneous according to Justice Kennedy. He believes the Court should examine "the actual, physical characteristics and uses of the property." *Id.* at 2716 (Kennedy, J., concurring in judgment).

177. *Id.* at 2706 (quoting Hague v. Committee for Indus. Org., 307 U.S. 496, 515 (1939)).

first time the Court has made the standard a touchstone of its decision.[178]

2. Designated Public Forums

Since public schools do not fit within the Court's definition of a traditional public forum,[179] forum analysis for purposes of speech at public schools hinges upon whether the school is a designated public or nonpublic forum. The designated public forum "consists of public property which the State has opened for use by the public as a place for expressive activity."[180] This forum includes a sub-category called the "limited public forum"[181] which exists "when [the] government opens a nonpublic forum but limits the expressive activity to certain kinds of speakers or to the discussion of certain subjects."[182] The limited public forum is thus contrasted with the designated public forum which the state has opened for all expressive purposes.[183]

In his concurrence to *International Society for Krishna Consciousness*, Justice Kennedy questioned whether the majority implicitly abolished the designated public forum category[184] because the majority opinion noted that, even though airports tolerate expressive activity on their premises, "the terminals have never been dedicated (except under the threat of court order) to expression in the form sought to be exercised here: the solicitation of contributions and the distribution of literature."[185] The Court's statement may thus discourage future judicial inquiries regarding policy and practice in extent determinations, but whether lower courts will interpret this statement this broadly remains to be seen.[186]

178. 112 S. Ct. 2701 (1992).

179. *See, e.g.*, Gregoire v. Centennial Sch. Dist., 907 F.2d 1366, 1370-71 (3d Cir.), *cert. denied*, 111 S. Ct. 253 (1990).

180. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1985).

181. *Id.*; Travis v. Owego-Apalachin Sch. Dist., 927 F.2d 688, 692 (2d Cir. 1991).

182. *Travis*, 927 F.2d at 692 (citing Deeper Life Christian Fellowship v. Board of Educ., 852 F.2d 676, 679 (2d Cir. 1988) and Calash v. City of Bridgeport, 788 F.2d 80, 82 (2d Cir. 1986)); *see Perry Educ. Ass'n*, 460 U.S. at 46 n.7.

183. *See Perry Educ. Ass'n*, 460 U.S. at 45.

184. International Soc'y for Krishna Consciousness, Inc. v. Lee, 112 S. Ct. 2701, 2717 (1992).

185. *Id.* at 2707.

186. There may be room for interpreting this reasoning as similar to the Court's statement in United States v. Kokinda, 110 S. Ct. 3115 (1990), where a plurality of the Court stated that permitting expression is not the same as intentionally opening a forum. *Id.* at 3121. The only difference between the two cases is that in *International Society for Krishna Consciousness, Inc.* the justices holding this view finally attained a majority rather than a plurality. Lower courts could construe *International Society for Krishna Consciousness, Inc.* as an affirmation of the plurality opinion in *Kokinda*.

3. Non-Public Forums

A nonpublic forum includes any public property that is neither a traditional public forum nor a designated public forum. For instance, "[p]ublic property which is not by tradition or designation a forum for public communication."[187]

4. Distinguishing between Designated and Non-Public Forums

Forum classification is a two-part process. The first part is an analysis of the type of forum involved. The type of forum is generally determined by the intent of and extent of use granted by the state.[188]

To ascertain the state's intent regarding a forum, courts first examine "the policy and practice of the government."[189] Thus, determining intent consists of focusing upon what a school does, not what it says:[190] "[A]ctual practice speaks louder than words."[191]

Intent may also be derived by examining "the nature of the property and its compatibility with expressive activity."[192] For example, in *Jones v. North Carolina Prisoners' Labor Union*[193] the Court held that a prison environment was not conducive to unrestricted First Amendment freedom of expression,[194] and therefore, a prisoner "does not retain those First Amendment rights that are inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system."[195]

The second key factor in forum classification concerns the extent of use granted by the state. Courts must determine "by examining . . . policy and practice, whether use of its facilities is open to 'all comers' or whether it has been limited by well-defined standards tied to the nature

187. *Perry Educ. Ass'n*, 460 U.S. at 46.

188. Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 802 (1985).

189. *Id.*; *see also* Madison, Joint Sch. Dist. No. 8 v. Wisconsin Employment Relations Comm'n, 429 U.S. 167, 174-76 (1976) (creating an open forum when school board opens its meetings for "direct citizen involvement"); Adderley v. Florida, 385 U.S. 39, 47 (1966) (denying access to individuals on property outside jailhouse).

190. Gregoire v. Centennial Sch. Dist., 907 F.2d 1366, 1374 (3d Cir.), *cert. denied*, 111 S. Ct. 253 (1990) (quoting Board of Educ. v. Mergens, 496 U.S. 226, 244). For example, a school's policy may state that the premises may not be leased for any purposes; however, school officials may elect to grant access to organizations for community functions.

191. Grace Bible Fellowship, Inc. v. Maine Sch. Admin. Dist., 941 F.2d 45, 47 (1st Cir. 1991).

192. *Cornelius*, 473 U.S. at 802; *see also* Greer v. Spock, 424 U.S. 828, 838 (1976) (finding that purpose of military base is to train soldiers not to provide a public forum for partisan political speeches).

193. 433 U.S. 119 (1977).

194. *Id.* at 129.

195. *Id.* (citing Pell v. Procunier, 417 U.S. 817, 822 (1974)).

and function of the forum."[196]

In *Gregoire v. Centennial School District,*[197] the Third Circuit Court of Appeals provides a good analysis of these factors. *Gregoire* involved a school's denial of permission for an evangelical organization to rent the school's auditorium after school hours for a program featuring a magician.[198] The magician performs his act during the first half of the show, and at intermission, anyone may leave.[199] In the second half, the magician offers a testimony of how Jesus Christ has affected his life.[200] The school based its denial of permission on its policy prohibiting the use of school facilities for religious activities.[201] The court found that the school could not prohibit a religious organization from using its facilities when the school had "in reality, opened its doors to those groups substantially outside what is commonly thought of as the educational mission of the school."[202]

The *Gregoire* court also considered the consistency of the school's policy in granting or denying access in evaluating the extent of use granted by the state.[203] In reviewing the school's "permission procedure and its application to similarly situated speakers,"[204] the court stated that the school "must be consistent in granting facilities access: where it permits potentially divisive or conversion-oriented speech by outsiders to a student audience in school facilities in the afternoon and determines [t]hat this speech is consistent with the function and mission of the school system, it cannot . . . exclude the same type of speech directed to the same audience from its facilities in the evening."[205] Essentially, "evidence that the property is open to 'all-comers' and that access is consistently granted supports a finding that the forum is open."[206] Hence, the school district's policy in *Gregoire* was deemed unconstitutional.

The second part of the forum analysis concerns the restrictions of the state on the expression in the forum. If the speech platform is classified as nonpublic or closed, the state will have only to demonstrate a

196. Gregoire v. Centennial Sch. Dist., 907 F.2d 1366, 1371 (3d Cir.), *cert. denied,* 111 S. Ct. 253 (1990) (citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46-47 (1985)).
197. 907 F.2d 1366 (1990).
198. *Id.* at 1369.
199. *Id.*
200. *Id.*
201. *Id.*
202. *Id.* at 1375.
203. *Id.* at 1371.
204. *Id.*
205. *Id.* at 1379.
206. Slotterback v. Interboro Sch. Dist., 766 F. Supp. 280, 292 (E.D. Pa. 1991) (citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 47 (1983); *Gregoire,* 907 F.2d at 1371)).

reasonable justification for its proscription or restrictions on speech.[207] However, if the forum is "designated," the state must show that its regulation of speech is narrowly tailored to further a compelling state interest.[208]

VII. THE FORUM DOCTRINE AND PUBLIC SCHOOL GRADUATION CEREMONIES

It may not initially be apparent why forum analysis is the proper analytical framework for the graduation prayer situation in *Lee v. Weisman*,[209] especially since the forum doctrine is usually only invoked when the state has denied access to its property and the speaker challenges that decision.[210] In *Weisman* the state did not deny access to a speaker. Rather, the public school authorities opened a state forum to a religious speaker, a rabbi, by inviting him to speak at the school's graduation ceremonies,[211] and a student sought the denial of access. In *Weisman* the student sought to use the state as an agent in closing the forum to a religious speaker. Thus, the end result is the same as if the state itself had denied access: the prohibition of religious expression.

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207. "[A]s long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view," the court will uphold the restriction. *Perry Educ. Ass'n*, 460 U.S. at 46. With respect to the school scenario, the Supreme Court has held that the school's "concern for the 'basic educational mission' of the school which gives it authority by the use of 'reasonable restrictions' over in-class speech that it could not censor outside the classroom." Bishop v. Aronov, 926 F.2d 1066, 1074 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 3026 (1992) (quoting Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266-67 (1988) (citations omitted)). For the Court's most recent application of the reasonableness standard, see International Soc'y for Krishna Consciousness Inc. v. Lee, 112 S. Ct. 2701, 2708-09 (1992).

208. *See supra* note 171.

209. 112 S. Ct. 2649 (1992).

210. In other situations the reasons for using forum analysis are more clearly evident. One court has used a forum analysis to analyze the constitutionality of a school's omission of invocations and benedictions from prayers at graduation ceremonies. In Lundberg v. West Monona Community School District, 731 F. Supp. 331 (N.D. Iowa 1989), plaintiffs argued that the school's failure to permit invocations or benedictions at the graduation exercises violated, among other rights, their right to free speech. *Id.* at 336. Engaging in the forum analysis, the court found that the graduation ceremony at issue was a nonpublic forum. The court explained:

> The evidence at the hearing established that the . . . School District organizes, authorizes, and sponsors the Onawa High School commencement program. The event is conducted on school property using school facilities, which event school employees carry out. The school sets the program for the commencement ceremony, having the sole discretion to dictate its content. While the school cannot dictate the actual words spoken, the school does retain control over the type of speech admissible at the ceremony.

Id. at 337. The court concluded that "[t]he bottom line is that while the school could have, it did not create the graduation ceremony 'for the purpose of providing a forum for expressive activity.' " *Id.* (quoting Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 805 (1985)). While the result of this case is debatable, *Lundberg* accomplishes one important objective: the use of the forum analysis for examining prayers at high school graduation ceremonies is appropriate.

211. *See supra* note 1 and accompanying text.

Thus, the central issue in *Weisman* is whether the state may constitutionally deny an outsider access to the graduation platform for expressive purposes. In analyzing this issue, note that the forum doctrine does not preclude consideration of Establishment Clause concerns. Rather, it allows a balancing of competing interests.

Under forum analysis, the courts must first classify the forum provided by public school graduation ceremonies.[212] However, in so doing, the forum need not be open to the public to be a public forum. As the Court stated in *Cornelius v. NAACP Legal Defense & Educational Fund*,[213] "a public forum may be created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by *certain speakers*, or for the discussion of *certain subjects*."[214]

In *Weisman* there is little question that the school intended to open its graduation ceremony to the expressive activity of various speakers, including religious expression. Indeed, the school's policy permits clergy from any faith to offer a brief invocation and benediction at its graduation ceremonies.[215] Thus, in the view of this article, the graduation ceremony in *Weisman* constituted a public forum or at the least a designated public forum.

However, the *Weisman* plaintiff contended that *even if a forum were opened*, the forum should be closed to religious speakers offering prayers. The plaintiff further contended that the Establishment Clause provides a state interest sufficient to justify closing the graduation forum to speakers on the basis of the religious content of their speech.[216] Indeed, when

212. By recommending that courts use the forum analysis in this case, this article does not intend to imply that it automatically concludes that the forum is a public or designated forum. Rather it simply contends that this framework—regardless of the outcome—is the best mode of analysis.

213. 473 U.S. 788 (1985).

214. *Id.* at 802 (citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983) (emphasis added)).

215. Weisman v. Lee, 728 F. Supp. 68, 69 (D.R.I. 1990); Respondent's Brief in Opposition to Petition for Writ of Certiorari, Lee v. Weisman, S. Ct. No. 90-1014, app. at A-4-A-8.

216. Lee v. Weisman, 112 S. Ct. 2649, 2651 (1992). In addition to Establishment Clause concerns, the state will offer other compelling interests. For example, a school may seek to legitimize a ban on religious expression claiming that such a prohibition is fundamental in providing an educational environment. Slotterback v. Interboro Sch. Dist., 766 F. Supp. 280, 293 (E.D. Pa. 1991). One court, however, rejected such a claim. It stated, "a public secondary school environment is not fully 'educational' where students' personal intercommunication is restricted to particular issues. Such restrictions stunt the growth of budding citizens and budding minds." *Id.* at 293-94. Schools will contend that they "have a compelling interest in preventing material disruptions of classwork, substantial disorder, and invasion of the rights of others." *Id.* at 297 (citing Thompson v. Waynesboro Area Sch. Dist., 673 F. Supp. 1379, 1392 (M.D. Pa. 1987); Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 823 n.3 (1985) (Blackmun, J., dissenting); Widmar v. Vincent, 454 U.S. 263, 277 (1981); Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 513 (1969)).

religious speakers seek access to public schools for expressive purposes, school officials often contend that proscription of religious expression is required by the Establishment Clause.[217] Although there may be some cases where this is true, *Weisman* is not one of them due to the lack of state action involved.[218] "[T]he Supreme Court has refused to find the Establishment Clause to be a sufficiently compelling interest to exclude private religious speech even from a limited public forum created by the government."[219]

In *Weisman*, a private citizen engaged in religious expression, not the state. The state neither composed nor offered the prayer. Even though the principal invited the rabbi to speak and provided the school's guidelines for nonsectarian prayer, this does not constitute sufficient state action to transform the private speech into state speech. As one lower district court notes: "[T]he mere fact that . . . speech occurs on school property [during a school ceremony] does not make it government supported."[220] Moreover, as the Court held in *Board of Education v. Mergens*:[221] "[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."[222] The question of when the state fails to clear "[t]he threshold question in any Establishment Clause case is whether there is sufficient governmental action to invoke the prohibition."[223]

Weisman is similar to a Seventh Circuit Court of Appeals case where city authorities permitted a private organization to display religious art in a downtown park during the holiday season.[224] For many years, the city along with various private parties decorated its downtown section during the holiday season.[225] Decorations consisted of a Santa Clause house in an area park to a "Festival of Lights" configuration.[226]

217. *See, e.g.*, Travis v. Owego-Apalachin Sch. Dist., 927 F.2d 688, 694 (2d Cir. 1991); Gregoire v. Centennial Sch. Dist., 907 F.2d 1366, 1380-82 (3d Cir.), *cert. denied*, 111 S. Ct. 253 (1990); *Slotterback*, 766 F. Supp. at 294.

218. A historical analysis may demonstrate that the Establishment Clause is not appropriate in cases of conflicting claims when the Establishment Clause may not be the proper standard in the traditional sense. This article, however, is discussing conflicting claims in general as well as the specific *Weisman* claim, and in many cases, state action may exist in other cases. It maintains that, in any case, regardless of the level of state action, the free speech analysis is the proper starting point.

219. Doe v. Small, 964 F.2d 611, 618 (7th Cir. 1992) (en banc) (citing *Widmar*, 454 U.S. at 271).

220. Rivera v. East Otero Sch. Dist., 721 F. Supp. 1189, 1195 (D. Colo. 1989).

221. 496 U.S. 226 (1990).

222. *Id.* at 250 (O' Connor, J., plurality); *see Small*, 964 F.2d at 622.

223. *Rivera*, 721 F. Supp. at 1195.

224. Doe v. Small, 964 F.2d 611 (7th Cir. 1992) (en banc).

225. *Id.* at 614-15.

226. *Id.* at 615.

In the 1960s private parties exhibited a set of sixteen canvas paintings "in an effort to 'put Christ back in Christmas.' "[227] The paintings were not displayed in the 1970s, but in an attempt to find a new owner to store the paintings, the Jaycees volunteered to take care of the paintings and exhibit them in Washington Park during the holiday season.[228] When displayed, the paintings occupied 6.34 percent of the park and a sign accompanying the paintings noted that the Jaycees sponsored the display without the use of public funds.[229] A private citizen challenged the display of the paintings in the city park, arguing that the paintings "represent an unacceptable endorsement of Christianity by the city and violate the constitutional rights of all Ottawans who are not Christians."[230] The city resisted the attempt to cancel the display of the paintings in its park.[231]

At trial the district court entered summary judgment in favor of the plaintiff finding that the paintings violated the Establishment Clause, and permanently enjoined the exhibit.[232] The judge, according to the appellate court, "obviously viewed the City . . . as a participant in the Jaycees' speech."[233]

The Seventh Circuit Court of Appeals disagreed with the district court's view of the privileges of an open forum[234] and reversed the district court's holding, finding that private parties cannot be prevented from expressing themselves in a public forum on the basis of the religious content of the expression.[235] The appellate court criticized the lower court for ignoring the difference between government speech and private speech.[236]

Without much elaboration, the court determined that the city park constituted a traditional public forum, and thus proceeded with its forum analysis.[237] The court rejected the district court's finding that "the government's obligation to avoid violating the Establishment Clause to be a

227. *Id.* at 612. From 1964 to 1967, the city arranged for the display. *Id.* at 612-13.
228. *Id.* at 613.
229. *Id.*
230. *Id.* at 615.
231. *Id.* at 615-16.
232. *Id.* at 616-17 (citing Doe v. Small, 726 F. Supp. 713 (N.D. Ill. 1989)).
233. *Id.* at 616. The judge stated: "[I]t makes no difference to the analysis or result that Washington Park may be a public forum. . . . City Defendants may—and must—regulate religious speech in Washington Park, including that of Jaycees, if such speech presents the danger of a violation of the Establishment Clause." *Id.* at 616-17 (quoting *Small*, 726 F. Supp. at 724).
234. *Id.* at 617-18.
235. *Id.* at 619.
236. *Id.* at 617-18.
237. *Id.* at 613, 618.

sufficiently compelling interest to justify a content-based exclusion of religious speech in Washington Park."[238] The court further acknowledged that "[w]hile the government's interest 'in complying with its Constitutional obligations *may* be characterized as compelling,' . . . the Supreme Court has refused to find the Establishment Clause to be a sufficiently compelling interest to exclude private religious speech even from a limited public forum created by the government."[239]

Noting that the Establishment Clause is limited by the Free Exercise and Free Speech Clauses, the court concluded that the Establishment Clause does not mandate exclusion of private religious speech from a public forum.[240] The presence of religious symbols on public property, according to the court, do not create the presumption that the government endorses the speech. Instead, the city is under a constitutional mandate to allow private parties to exhibit the paintings.

However, in the public school context courts have expressed concern that students may not be able to distinguish between private and government speech. Thus, the maturity of the students becomes a relevant concern in evaluating whether the school is within the strictures of the Establishment Clause. Some fear that to a young student, even the mere appearance of secular involvement in religious activities, allowing students to distribute religious literature on school grounds, might lead the student to believe the state approves of a certain religious message.[241]

In this regard, the Supreme Court determined that university and college students have the capacity to appreciate the neutrality of the state, even where the learning institution permits religious organizations to meet in school buildings.[242] In addition, courts concur that high school students possess the ability to discern whether the school is endorsing an activity or merely allowing an activity to take place without promotion or inhibition.[243] The Supreme Court has said "that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis."[244]

238. *Id.* at 618 (citing Doe v. Small, 726 F. Supp. 713, 724 (N.D. Ill. 1989)).

239. *Id.* (quoting Widmar v. Vincent, 454 U.S. 263, 271 (1981)).

240. *Id.* at 618-19.

241. *See* Slotterback v. Interboro Sch. Dist., 766 F. Supp. 280, 296-97 (E.D. Pa. 1991).

242. *Widmar*, 454 U.S. at 274.

243. Board of Educ. v. Mergens, 496 U.S. 226, 250 (1990). One court recently held that junior high school students possess the requisite maturity to make such a distinction. Hedges v. Wauconda Community Unit Sch. Dist., No. 90-C-6604, 1992 U.S. Dist. LEXIS 14716 (N.D. Ill 1992).

244. *Id. See also* JOHN W. WHITEHEAD, THE RIGHTS OF RELIGIOUS PERSONS IN PUBLIC EDUCATION 73-80 (1991) (concerning the maturity issue).

However, in the graduation prayer situation, students, regardless of their age, should be able to discern that a rabbi is a private speaker. An objective observer, even a junior high school student, would be able to discern that the school was simply permitting a prayer and not approving of its content.[245]

It should be noted that the school authorities in *Weisman* did not compel the audience at the graduation ceremony to participate in the prayer, unlike other cases involving prayer in public schools.[246] In *Weisman* no evidence existed indicating that the students at the ceremony would mistake the prayer for government speech. Such a mistake was only a theoretical risk and elimination of all theoretical risks is not a compelling state interest.

Thus, courts reviewing restrictions on religious speech in public schools must begin to consider free speech interests as well as Establishment Clause concerns. As such, forum analysis is nothing more than a balancing of competing constitutional interests.

Notwithstanding the outcome, this analytical framework would lead the strict separationist to balance the competing interests and to examine the merits of each. Moreover, in view of the evolution of church and state in America, as discussed earlier, courts considering such issues should favor the free speech interest. As one commentator suggests with respect to the Free Exercise Clause, courts place more weight on the free speech scale and deem it the paramount interest.[247]

Contrasted with the free speech issues, the Establishment Clause concerns are barely evident in *Weisman*.[248] An examination of the long tradition of the graduation invocation or benediction fails to reveal the establishment of a church through the practice.

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245. Of course, schools can make certain such confusion does not occur by providing a disclaimer in the graduation program or before the ceremony begins. *See* Lee v. Weisman, 112 S. Ct. 2649, 2685 (1992) (Scalia, J., dissenting). In some situations, disclaimers are problematic. When the government is disassociating itself from one type of speech, but not another, the state creates the impression that the speech requiring a disclaimer is inferior or different. When such speech is religious, this bifurcation may come close to violating the Establishment Clause. *See infra* notes 408-11.

246. *Compare Weisman*, 112 S. Ct. at 2649 *with* Wallace v. Jaffree, 466 U.S. 924 (1984) (requiring students to join teachers in reading prayer aloud).

247. DRAKEMAN, *supra* note 42, at 117.

248. For examples of cases where the Establishment Clause concerns are more apparent, see Edwards v. Aguillard, 482 U.S. 578 (1987) (requiring instruction on creationism at state's direction); Wallace v. Jaffree, 472 U.S. 38 (1985) (requiring a "period of silence" for voluntary prayer or meditation); Stone v. Graham, 449 U.S. 39 (1980), *reh'g denied*, 449 U.S. 1104 (1981) (mandating posting of the Ten Commandments); School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963) (mandating Bible reading); Engel v. Vitale, 370 U.S. 421 (1962) (requiring state-directed prayer); McCollum v. Board of Educ., 333 U.S. 203 (1948) (requiring state-directed religious training at school).

VIII. STUDENT SPEECH: NO BALANCING REQUIRED

Because student speech in the public school setting is a matter entirely different than the religious speech of an outsider to the school forum, school authorities should avoid involvement in planning graduation ceremonies and permit students to select the speaker or permit students to be the speakers. This would allow schools to avoid Establishment Clause challenges to religious tolerance and the consequential balancing of interests that follows.[249]

As detailed earlier, forum analysis is appropriate where an outsider seeks access to a public or designated public forum since conflict between constitutional provisions may arise. However, the same concerns are absent with respect to student speech and the special circumstances of the school environment preclude the need for balancing.

In *Tinker v. Des Moines Independent Community School District,*[250] the Court articulated the ideal framework for evaluating student speech in the public school context.[251] This part of the article examines *Tinker* and the Supreme Court's subsequent student speech decisions[252] and argues that the Court erred in departing from its guidelines in *Tinker.*[253]

The objective evidentiary inquiry set forth in *Tinker* restricts judicial discretion and best furthers the values underlying the First Amendment.[254] Although some may claim that student religious speech should be analyzed strictly within the prohibitions of the Establishment Clause, this article maintains that the provisions of *Tinker* are applicable regardless of the content of student speech.[255]

IX. THE SUPREME COURT AND STUDENT SPEECH

The Supreme Court has frequently faced constitutional issues in the public schools.[256] Less frequently, however, has the Court expressly considered the extent to which speech expressed within the confines of the public school is protected. The first case in which the Court addressed

249. Lee v. Weisman, 112 S. Ct. 2649, 2685 (1992) (Scalia, J., dissenting).

250. 393 U.S. 503 (1969).

251. *Accord* William B. Senhauser, Note, *Education and The Court: The Supreme Court's Educational Ideology,* 40 VAND. L. REV. 939 (1987).

252. *See infra* notes 262-349 and accompanying text.

253. *See infra* notes 354-447 and accompanying text.

254. *See infra* notes 380-403 and accompanying text.

255. *See infra* notes 404-10 and accompanying text.

256. *See, e.g.,* Edwards v. Aguillard, 482 U.S. 578 (1987) (involving teaching of creationism); Wallace v. Jaffree, 472 U.S. 38 (1985) (involving "period of silence" for voluntary prayer or meditation); Stone v. Graham, 449 U.S. 39 (1980) (involving posting of the Ten Commandments); School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963) (involving Bible reading); Engel v.

this issue was *West Virginia State Board of Education v. Barnette*[257] where students asked the Court to protect their right *not* to speak.

Faced with expulsion from school, the students, who were Jehovah's Witnesses, challenged a state board of education resolution requiring all students to salute and pledge allegiance to the American flag[258] due to conflict with their religious beliefs.[259] The Court held that the state school board could neither require the students to salute the flag nor punish them for refusing to do so. In this conflict between the state and individual rights, the Court "appl[ied] the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization."[260] Moreover, the Court added:

> To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions of free minds. We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. . . . [F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.[261]

In *Tinker v. Des Moines Independent Community School District*[262] the Court affirmed its view in *Barnette* by creating a high standard for school officials to overcome in order to justify proscriptions on student speech.[263] Of course, *Tinker*[264] is the Court's landmark student speech decision.

In *Tinker* two high school students and one junior high school student challenged the constitutionality of a school policy forbidding students from wearing armbands.[265] Des Moines school authorities adopted the policy after learning of student plans to wear black armbands during

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Vitale, 370 U.S. 421 (1962) (involving prayer); Brown v. Board of Educ., 347 U.S. 483 (1954) (mandating desegregation); McCollum v. Board of Educ., 333 U.S. 203 (1948) (involving religious training at school).

257. 319 U.S. 624 (1943). William G. Buss, *School Newspapers, Public Forum and the First Amendment*, 74 IOWA L. REV. 505, 535-37 (1989) (discussing the importance of the decision).

258. *Barnette*, 319 U.S. at 627-29.

259. *Id.* at 629.

260. *Id.* at 641.

261. *Id.* at 641-42.

262. 393 U.S. 503 (1969).

263. *See infra* notes 265-83.

264. *Tinker*, 393 U.S. at 504.

265. *Id.*

the holiday season in order to protest the Vietnam conflict.[266] The school rule provided that students wearing such armbands would be asked to remove them and if they refused, the students would be suspended until compliance.[267] The *Tinker* students wore the armbands to school, and in accordance with school policy, they were sent home.[268] They did not return to school until after the holiday season; they wore their armbands according to the planned protest rather than forego their First Amendment rights.[269]

The Supreme Court first considered whether wearing armbands is "speech" protected by the First Amendment.[270] Without much discussion, the Court recognized that this conduct "was closely akin to 'pure speech,' which . . . is entitled to comprehensive protection under the First Amendment."[271] The Court then affirmed "the unmistakable holding of the Court for almost 50 years":[272] the Constitution protects the First Amendment rights of students.[273]

For the Court, Justice Fortas writes: "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[274] The difficulty in protecting these rights in *Tinker* and similar cases, according to the Court, arises when such interests conflict with the judicially recognized "need for affirming the comprehensive authority of the States and of school officials . . . to prescribe and control conduct in the schools."[275]

The Court reviewed the circumstances in which school officials may

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.* at 505-06.

271. *Id.* at 505-06 (citing Adderley v. Florida, 385 U.S. 39 (1966); Cox v. Louisiana, 379 U.S. 536, 555 (1965)).

272. *Id.* at 506. Justice Fortas pointed to numerous Supreme Court cases in which the Court protected the First Amendment rights of students. *Id.* at 506-507 (citing Epperson v. Arkansas, 393 U.S. 97, 97 (1968); Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967); Engel v. Vitale, 370 U.S. 421 (1962); Shelton v. Tucker, 364 U.S. 479, 487 (1960); Wieman v. Updegraff, 344 U.S. 183, 195 (1952) (concurring opinion); McCollum v. Board of Educ., 333 U.S. 203 (1948); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923); Bartels v. Iowa, 262 U.S. 404 (1923)).

273. *Id.* at 506-07.

274. *Id.* at 506.

275. *Id.* at 507 (citations omitted).

establish such proscriptions and yet remain "consistent with fundamental constitutional safeguards."[276] Rather than balancing the school's particular interests against the specific student expressive activity, the *Tinker* Court formulated a bright line rule. In cases where the First Amendment rights of students conflict with the state's interest in regulating conduct, the Court held that restrictions on student speech should be upheld in only two situations: (1) where the expressive activity materially disrupts the educational process; or (2) where the expressive activity "colli[des] with the rights of other students to be secure and to be let alone."[277] If school officials cannot demonstrate that their restrictions on the student speech is within one of these situations, the restriction is not constitutional.

Elaborating on these evidentiary inquiries, the Court provided guidelines for future decisions. First, Justice Fortas said that school officials must demonstrate that actual disruption or infringement has occurred. Second, the school "must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[278] Moreover, "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."[279]

Concluding its discussion, the Court recognized the necessity of promoting student speech. Schools, according to the Court, should not serve as "enclaves of totalitarianism" or attempt to "foster a homogeneous people."[280] While previous Supreme Court decisions were related to the classroom, the cases are not confined to classroom discussion.[281] Indeed,

> [t]he principle of these cases is not confined to the supervised and ordained discussion which takes place in the classroom. The principal use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. Among those activities is personal intercommunication among the students. This is not only an inevitable part of the process of attending school; it is also an important part of the educational process.[282]

The First Amendment rights of students, according to the Court, thus extends beyond the classroom—to the cafeteria, playground, and other

276. *Id.*
277. *Id.* at 508.
278. *Id.* at 509.
279. *Id.* at 508.
280. *Id.* at 511.
281. *Id.* at 512.
282. *Id.*

areas of the school.[283]

However in two more recent cases, *Bethel School District v. Fraser*[284] and *Hazelwood School District v. Kuhlmeier*,[285] the Court placed significant limitations on the scope of *Tinker* and essentially retreated from its decision in *Barnette*. In *Bethel School District No. 403 v. Fraser*[286] the Supreme Court first intimated that it would limit *Tinker*. Although the Court appeared to rely on *Tinker* for its decision in *Bethel*, Justice White later maintained in *Hazelwood School District v. Kuhlmeier*[287] that *Bethel* and *Tinker* were not decided under the same analysis[288] and that the nature of the speech was the key to the *Bethel* decision.[289]

In *Bethel* the Court considered the constitutionality of the school's reaction to a high school student's speech nominating a classmate for student government.[290] The student's speech was part of a mandatory assembly designed to teach students about self-government.[291] Throughout his speech, however, the student "referred to his candidate in terms of an elaborate, graphic, and explicit sexual metaphor."[292] Student reaction to the speech varied: "Some students hooted and yelled; some by gestures graphically simulated the sexual activities pointedly alluded to in respondent's speech. Other students appeared to be bewildered and embarrassed by the speech."[293] In addition, one teacher had to forego part of her class to discuss the speech.[294] The following day, an assistant

283. *Id.* at 512-13.
284. 478 U.S. 675 (1986).
285. 484 U.S. 260 (1988).
286. 478 U.S. 675 (1986).
287. 484 U.S. 260 (1988).
288. *Id.* at 271-72 n.4. The Court, however, has explicitly relied upon the *Tinker* standard on at least two other occasions. *See* Papish v. Board of Curators, 410 U.S. 667 (1973) (per curiam) and Healy v. James, 408 U.S. 169 (1972).
289. *Papish*, 410 U.S. at 667.
290. *Bethel*, 478 U.S. at 677.
291. *Id.*
292. *Id.* at 677-78. Justice Brennan quoted the entire speech in his concurring opinion:

> I know of a man who is firm—he's firm in his pants, he's firm in his shirt, his character is firm—but most . . . of all, his belief in you, the students of Bethel, is firm.
> Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts—he drives hard, pushing and pushing until finally—he succeeds.
> Jeff is a man who will go to the very end—even the climax, for each and every one of you. So vote for Jeff for A. S. B. vice-president—he'll never come between you and the best our high school can be.

Id. at 687 (Brennan, J., concurring in judgment) (quoting App. 47). Prior to the assembly, the student permitted two teachers to read the speech, and they warned him that it was inappropriate and that serious consequences would result if he delivered the speech. *Id.* at 678.
293. *Id.* at 678.
294. *Id.*

principal called the student speaker to her office and after admittingly using the speech intentionally, the principal suspended him for three days.[295] The basis for the student's suspension was the violation of a school disciplinary rule proscribing the use of obscene language in the school: "Conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures."[296] A hearing officer upheld the suspension,[297] and the student filed suit. Both the district court and the court of appeals held the suspension was unconstitutional, and the appellate court found that the student's "speech was indistinguishable from the protest armband in *Tinker*."[298]

However, the Supreme Court reversed that finding. Although the court of appeals had noted that the lewd expression of the student was "essentially the same" as the expression in *Tinker*,[299] the Supreme Court disagreed, but found that the same standard governed both situations: whether the expressive activity disrupts the educational process or infringes upon the rights of other students.[300] Chief Justice Burger, writing for the Court, noted that such restraints upon student speech would not be remarkably different than those placed on non-students:

> The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against society's countervailing interest in teaching students the boundaries of socially appropriate behavior. Even the most heated political discourse in a democratic society requires consideration for the personal sensibilities of the other participants and audiences.[301]

Chief Justice Burger referred to congressional rules forbidding the use of offensive expressions during debate,[302] and to the fact that Congress had censured some of its members for "abusive language" directed to other Congressman.[303] Turning to the nature of the expression at issue, the Court recognized that it had earlier upheld the right to express a

295. *Id.* She also removed his name from the list of candidates for graduation speaker. *Id.*
296. *Id.*
297. *Id.* at 678-79.
298. *Id.* at 679.
299. *Id.* at 680.
300. *Id.* at 683.
301. *Id.* at 681.
302. *Id.* at 682 (citing THOMAS JEFFERSON'S MANUAL OF PARLIAMENTARY PRACTICE §§ 359, 360, *reprinted in* H.R. DOC. NO. 271, 97th Cong., 2d Sess. 111 n.a, 158-59 (1983); SENATE PROCEDURE, S. DOC. NO. 2, 97th Cong., 1st Sess. 568-69, 588-91 (1981)).
303. *Id.* at 681-82 (citing SENATE ELECTION, EXPULSION AND CENSURE CASES FROM 1793 TO 1972, S. DOC. NO. 7, 92d Cong., 1st Sess. 95-98 (1972) (Sens. McLaurin and Tillman); *id.* at 152-53 (Sen. McCarthy)).

political viewpoint despite its highly offensive nature.[304] Yet, "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."[305] The Court found that the expression in *Bethel* disrupted the educational process and offended the rights of other students, reasoning that lewd and indecent speech can interfere with the school's role in teaching "civil, mature conduct" and proper ways to engage in political discourse.[306] In addition, the Court found the student's speech offensive to both teachers and students alike. By glorifying male sexuality, the speech was acutely insulting to girl students.[307] The Court also noted that some classmates were "bewildered by the speech and the reaction of mimicry it provoked."[308]

It appears that the lewd, indecent nature of the speech provided the basis for the Court's decision. The Court has itself maintained that this reasoning distinguishes *Bethel* from *Tinker*, and thus makes the decisions compatible.[309]

Although the *Bethel* Court provided wide latitude to the school in determining whether speech was disruptive to the educational process and emphasized the offensive nature of the student speech, the Court did not explicitly reject *Tinker* as the appropriate standard for determining whether proscriptions on student speech were permissible.[310] However,

304. *Id.* (citing Cohen v. California, 403 U.S. 15 (1971)).

305. *Id.* (citing New Jersey v. T.L.O., 469 U.S. 325, 340-42 (1985)).

306. *Id.* at 683. Justice Brennan, in his concurring opinion, agreed that the speech disrupted the school's educational activities. He stated:

> [I]n light of the discretion school officials have to teach high school students how to conduct civil and effective public discourse, and to prevent disruption of school educational activities, it was not unconstitutional for school officials to conclude, under the circumstances of this case, that respondent's remarks exceed permissible limits.

Id. at 687-88 (Brennan, J., concurring). However, he did not find that the evidence demonstrated that the conduct offended fellow students. *Id.* at 689 n.2. Nonetheless, given the fact that the ban was not based on disagreement with a viewpoint, Justice Brennan concluded that the disruption of the educational process alone justified the suspension. *Id.* at 688-89.

307. *Id.* at 683 (citing brief at 77-81). The lewd nature of the speech particularly troubled the Court. It emphasized that the Court had recognized an interest in protecting young people from vulgar and offensive language. *Id.* at 684 (citing FCC v. Pacifica Foundation, 438 U.S. 726 (1978)). The Court reaffirmed its belief that "[s]uch utterances are no[t] [an] essential part of any exposition of ideas, and are of such slight social value . . . that any benefit . . . derived from them is clearly outweighed by the social interest in order and morality." *Id.* at 685 (citing Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).

308. *Id.* at 683-84.

309. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271-72 n.4 (1988).

310. *See also* Papish v. Board of Curators, 410 U.S. 667 (1973) (per curiam) (relying on *Tinker* standard to find suppression of lewd expression in college newspaper unconstitutional); Healy v. James, 408 U.S. 169 (1972) (relying on *Tinker* standard to strike down prohibition of formation of political student organization on university campus). *See generally* Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986).

in *Hazelwood School District v. Kuhlmeier,*[311] the Court in a surprising break[312] deemed the *Tinker* standard inappropriate in certain cases. In its 5-4 decision, the Court used a forum analysis standard to justify school regulation of a student newspaper.

In *Hazelwood* three former high school student staff members of a student newspaper challenged a principal's decision to remove two stories from the newspaper on the basis of content. The newspaper was produced and edited by a journalism class at the high school and received funding from the school along with supplemental funding from newspaper sales.[313] A teacher supervised the printing of the newspaper.[314] During the semester in question, the supervising teacher submitted the page proofs to the principal for his review.[315] In the final edition of the year the content of two stories troubled the principal.[316] One story related the experience of three students with pregnancy. The principal believed that other students could determine the identity of the students even though pseudonyms were used, and that the references to sexual activity and birth control might be inappropriate for younger students.[317] The other story discussed the impact of divorce on students. The principal's concern consisted of negative comments made by a student about her father, and the father's inability to respond.[318] Because he believed there was insufficient time to address his concerns without delaying publication beyond the school year, the principal published the newspaper without the pages upon which the stories appeared.[319] The students challenged the decision, arguing that their First Amendment rights had been violated.[320]

311. 484 U.S. 260 (1988).

312. Some may argue that the use of the public forum analysis in *Hazelwood* is not a "surprising break" from precedent, given the Court's decision in Widmar v. Vincent, 454 U.S. 263 (1982), where the Court relied on a forum analysis to force a university to permit religious groups to meet on campus. Although the *Widmar* Court should have relied on *Tinker,* it gave no indication that certain cases belonged under the *Tinker* framework, and other cases fell under the forum analysis. It made no attempt to distinguish *Tinker. Widmar,* 454 U.S. at 269. It provided no warning that such a bifurcation would occur in the public school context. *Id.*

313. *Hazelwood,* 484 U.S. at 262. The school district assumed responsibility for the entirety of the expenses. *Id.* at 262-63.

314. *Id.* at 263.

315. *Id.*

316. *Id.*

317. *Id.*

318. *Id.* In the page proofs, the student's name was used. The principal was unaware that the name was deleted in the final draft. *Id.*

319. *Id.* at 264. The principal chose this option over not publishing the newspaper. *Id.* at 263-64. Deleting the pages, however, also resulted in the omission of stories on teenage marriage, juvenile delinquents, and runaways. *Id.* at 264 n.1 (indicating the principal did not have a problem with the content of these stories).

320. *Id.* at 264.

The Supreme Court upheld the principal's decision.[321] Writing for the Court, Justice White opened the Court's opinion with an affirmation of the degree to which the First Amendment protects student speech, pointing to its recent decision in *Bethel School District*.[322] While the Constitution protects student speech, the Court reiterated that student First Amendment rights are not coextensive with the rights of citizens outside the school context.[323] The Court used forum analysis to determine whether the principal's decision was constitutional.

Justice White described the factors leading to the Court's departure from *Tinker* and *Hazelwood*. First, he intimated that *Tinker* remains established precedent, but said that *Tinker* only addresses situations where the "First Amendment requires a school to tolerate particular student speech."[324] *Hazelwood*, on the other hand, defines those situations where "the First Amendment requires a school affirmatively to promote particular student speech."[325] Justice White explained:

> [*Tinker*] addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. [*Hazelwood*] concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents and members of the public might reasonably perceive to bear the imprimatur of the school.[326]

In *Hazelwood* the school newspaper was essentially part of the school curriculum because its purpose was to impart information and skills to students.[327] The Court reasoned that with respect to its school newspaper, the school in *Hazelwood* was acting in its capacity as an educator, and as a speaker, and may thus constitutionally disassociate itself from what it deems to be inappropriate material.[328] Through its forum

321. The federal district court concluded that the decision was constitutional. *Id.* at 264 (citing Kuhlmeier v. Hazelwood Sch. Dist., 607 F. Supp. 1450 (E.D. Mo. 1985)). However, the court of appeals reversed, holding that such censorship was unconstitutional. Supporting the court's decision was the school's failure to demonstrate that the expression created a material disruption of the school's educational function or infringed the rights of other students. *Id.* at 264-65.

322. *Id.* at 266.

323. *Id.* (quoting Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1985)).

324. *Id.* at 270.

325. *Id.* at 270-71.

326. *Id.* at 271.

327. *Id.*

328. *Id.* In its capacity as publisher of the newspaper, the school may " 'disassociate itself' not only from speech that would 'substantially interfere with [its] work . . . or impinge on the rights of other students,' but also from speech that is, for example, ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences." *Id.*

analysis, the Court thus found that the school had reserved the newspaper forum for an educational purpose and had not created a limited public forum.[329]

The Court next examined whether the principal's actions had a rational relation to its educational mission—the proper standard for a nonpublic forum.[330] The Court concluded that the principal reasonably could have concluded that the student authors had not successfully mastered the techniques required for tackling controversial stories. Thus, the principal had not acted unreasonably in deleting the controversial articles.[331] The Court also found that the fears of the principal were reasonable.[332]

Justice Brennan, joined by Justices Marshall and Blackmun, dissented from the *Hazelwood* decision and asserted that the actions of the principal were a serious infringement of First Amendment rights. Recognizing the importance of the public educator's role in imparting knowledge and values to its pupils, the dissenters acknowledged that student speech occasionally interferes with the educational purpose.[333] Nonetheless, the dissenters asserted that the variance of a school newspaper's position with the position of school authorities is an insufficient reason to censor the stories: tolerating such censorship would "convert . . . public schools into 'enclaves of totalitarianism.' "[334] Justice Brennan further criticized the Court for departing from *Tinker* and its technique for balancing student expression rights and accommodation of legitimate pedagogical concerns.[335] Justice Brennan also expressed concern that the Court's *Hazelwood* approach endangered *Tinker* as established precedent,[336] and amazement concerning the distinction of the Court between personal and school-sponsored speech.[337]

The dissenters rejected the three reasons of the *Hazelwood* majority supporting greater control for educators than that provided by *Tinker*. According to Justice Brennan, *Tinker* gives educators the ability to end behavior that disrupts the educational process. Thus, the Court "need not abandon *Tinker* [but] only apply it" to conclude that the school can

329. *Id.* at 267-70.
330. *Id.* at 274-76.
331. *Id.*
332. *Id.*
333. *Id.* at 278-79 (Brennan, J., dissenting).
334. *Id.* at 280 (quoting Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 511 (1969)).
335. *Id.* at 280-81.
336. *Id.* at 281. This fear has been alleviated. Post-*Hazelwood* decisions continue to rely on *Tinker* in the tolerance situations.
337. *Id.* at 281-82.

refuse to publish an article that does not meet its journalistic standards.[338] Justice Brennan asserted, however, that censorship of the articles in *Hazelwood* was unrelated to pedagogical interests and that the purpose of the censorship was merely to dissociate the school from material the principal believed to be controversial.[339]

The Court's second rationale for its *Hazelwood* departure from *Tinker*, shielding an impressionable audience from unsuitable material, was illegitimate according to Justice Brennan.[340] Justice Brennan, looking at the premise underlying *Tinker*, noted that the Court has rejected a school's role as " 'thought police' stifling discussion of all but state-approved topics and advocacy of all but the official position."[341] This rationale "invites manipulation to achieve ends that cannot permissibly be achieved through blatant viewpoint discrimination and chills student speech to which school officials might not object."[342]

Finally, even though Justice Brennan accepted the school's desire to disassociate itself from student speech, he asserted that such disassociation could be achieved through means less burdensome than those offered by the school and accepted by the majority.[343] For example, the newspaper could have printed a disclaimer or published its own views on the published material.[344]

Thus, Justice Brennan concluded that because the censorship did not serve any legitimate pedagogical purpose, it could not have been designed to prevent classwork. Nor can the censorship be described as necessary to prevent student expression from "inva[ding] the rights of others."[345]

As discussed above, the *Tinker* Court held that student expression can be proscribed only in two situations: (1) where the expressive activity materially disrupts the educational process; or (2) where the expressive activity "colli[des] with the rights of other students to be secure and to be let alone."[346] In *Bethel* the Court limited the type of speech to which *Tinker* applies, holding that *Tinker's* protection does not include

338. *Id.* at 283-84.
339. *Id.* at 285.
340. *Id.* at 282-83.
341. *Id.* at 285-86.
342. *Id.* at 287-88.
343. *Id.* at 288-89.
344. *Id.* at 289.
345. *Id.*
346. Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 508 (1969). For a discussion of *Tinker*, see *supra* notes 265-83 and accompanying text.

obscene, indecent, or lewd speech.[347]

In *Hazelwood* the Court further limited *Tinker* to cases in which school officials must tolerate student speech and held that forum analysis should be used when a reasonable person might perceive that the school has placed its imprimatur on student expression.[348] In summary, after *Bethel* and *Hazelwood*, *Tinker* applies only to student-initiated speech that is neither lewd nor indecent. However, this article maintains that perhaps with the *Bethel* exception, *Tinker* should apply to *all* student speech.[349]

X. *TINKER*: THE PREFERRED METHOD OF ANALYSIS

The Court's *Hazelwood* decision has been oppugned.[350] Some commentators have argued that the Court improperly classified the *Hazelwood* newspaper as a nonpublic forum and a remote form of censorship.[351] Few commentators, however, have focused on what may have been the greatest failing of the Court's decision: its perceived departure from *Tinker*.[352] A comparison of *Hazelwood* and *Tinker* demonstrates why this departure is unwarranted, and in addition, why *Tinker* is the only appropriate analytical framework where conflict exists between the state's pedagogical interest and a student's free speech rights.

The reasons underlying this conclusion are two-fold. First, the *Tinker* analysis best fosters First Amendment interests. Because of the objective nature of the *Tinker* test, there is less support for suppression of free speech and more room for the promotion of student speech. Second, the *Tinker* analysis addresses student free speech issues more fully than forum analysis.

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347. 478 U.S. 675, 680 (1986).

348. *Hazelwood*, 484 U.S. at 271.

349. *See supra* notes 350-447 and accompanying text.

350. 484 U.S. 260.

351. *See, e.g.*, Buss, *supra* note 257, at 535-37; Helene Bryks, *A Lesson in School Censorship:* Hazelwood v. Kuhlmeier, 55 BROOK. L. REV. 291 (1989); Elaine M. Russo, *Prior Restraint and the High School "Free Press": The Implications of* Hazelwood School. District v. Kuhlmeier, 18 J.L. & EDUC. 1 (1989); Elletta Sangrey Callahan, Note, Hazelwood School District v. Kuhlmeier—*The Court Declines to* Tinker *with Students' Free Press Rights*, 15 J. CONTEMP. L. 1 (1989); Stuart Walters Belt, Note, Hazelwood School District v. Kuhlmeier, 16 N. KY. L. REV. 191 (1988); Mark N. Bonaguro, Note, Hazelwood School District v. Kuhlmeier: *How Useful Is Public Forum Analysis in Evaluating Restrictions on Student Expression in the Public Schools?*, 22 J. MARSHALL L. REV. 403 (1988); Walter E. Forehand, Note, *Tinkering with* Tinker: *Academic Freedom in the Public Schools*—Hazelwood School District v. Kuhlmeier, *108 S. Ct. 562 (1988)*, 16 FLA. ST. U. L. REV. 159 (1988).

352. *See Hazelwood*, 484 U.S. at 278-89 (Brennan, J., dissenting). *But see* Bryks, *supra* note 351, at 310, 314.

Although the Court continues to rely on the forum doctrine in deciding student speech cases,[353] support for such reliance is far from unanimous.[354] Various commentators have detailed the inadequacies of this

353. *See, e.g.*, International Soc'y for Krishna Consciousness, Inc. v. Lee, 112 S. Ct. 2701, 2702-05 (1992); United States v. Kokinda, 497 U.S. 720 (1990); Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788 (1985); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983).

354. C. Thomas Dianes, *The Trashing of the Public Forum: Problems in First Amendment Analysis,* 55 GEO. WASH. L. REV. 109 (1986); Farber & Nowak, *supra* note 166, at 1222-24; Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum,* 34 UCLA L. REV. 1713 (1987); Nadine Strossen, *A Framework for Evaluating Equal Access Claims by Student Religious Groups: Is There a Window for Free Speech in the Wall Separating Church and State?* 71 CORNELL L. REV. 143 (1985).

For example, in Hedges v. Wauconda Community Unit School District, No. 90-C-6604, 1992 U.S. Dist. LEXIS 14716 (N.D. Ill. 1992), the court debated extensively this question. The students challenging their school's anti-distribution policy argued that the forum analysis is inappropriate not only in distribution cases, but in any student speech case. *Id.* at *25. The students primarily maintained that because the key issue in the forum analysis focused on access, the framework is applicable to students who already have access to school facilities. *Id.* at *32-33. The gravamen of the students position contends that the court should draw a line between students, (insiders), and individuals outside the school community, (outsiders). Forum analysis should only be used in cases involving the latter category, the students agreed. The court rejected the students' argument, claiming it was "misguided." *Id.* at *32-33. The court based its conclusion on three key factors: (1) Supreme Court precedent; (2) binding appellate court precedent; and (3) the growing tendency to deem the *Tinker* analysis as irrelevant.

First, the court pointed to primarily two fundamental Supreme Court cases. Citing United States v. Kokinda, 110 S. Ct. 3115 (1990), a case concerning access to post office sidewalks, the court noted that the Supreme Court has held that having access to a forum for one purpose does not mean that an individual has access to a forum for all purposes. *Hedges,* 1992 U.S. Dist. LEXIS at *33-34 (citing *Kokinda,* 110 S. Ct. 3115). Perhaps the determinative holding for the court, howver, was *Hazelwood.* According to the court's construction of *Hazelwood,* the Supreme Court rejected the insider/outsider distinction by stating that when a school fails to create a public forum, it may impose reasonable restrictions on students and teachers. *Id.* at *36 (quoting *Hazelwood Sch. Dist.,* 484 U.S. at 267).

Pertinent and binding Seventh Circuit Court of Appeal precedent provided another determinative factor for the *Hedges* court. *Id.* at *37. Although the court had addressed the possibility of the validity of such an argument, the court nonetheless failed to apply the insider/outsider principle. *Id.* at *37-41 (citing May v. Evansville-Vanderburgh Sch. Corp., 787 F.2d 1105 (7th Cir. 1986)).

Finally, the court pointed to other federal cases in which courts have applied with increasing regularity the forum analysis to school settings. *Id.* at *41-42 (citing Grace Bible Fellowship v. Maine Sch. Admin. Dist., 941 F.2d 45, 47 (1st Cir. 1991); Gregoire v. Centennial Sch. Dist., 907 F.2d 1366, 1370 (3d Cir.), *cert. denied,* 111 S. Ct. 253 (1990); Bell v. Little Axe Indep. Sch. Dist., 766 F.2d 1391, 1401 (10th Cir. 1985); Bender v. Williamsport Area Sch. Dist., 741 F.2d 538, 545 (3d Cir. 1984), *vacated on other grounds,* 475 U.S. 534 (1986); Thompson v. Waynesboro Area Sch. Dist., 673 F. Supp. 1379, 1384 (M.D. Pa. 1987)). It recognized that while some courts continued to apply *Tinker* in student speech cases, the judicial trend intimates that the demise of *Tinker* is imminent, and concluded that it would follow that trend. *Id.* at *41-42 & n.16.

The court's reasoning, however, is "misguided" and erroneous on two different levels. On a larger scale, the court failed to fully consider all arguments in favor of using the forum analysis for *all* student speech cases. The situation in *Kokinda* is remotely different than the facts in *Hedges.* Students differ fundamentally from postal patrons—an issue the court neglected to address. Students are required to attend school; they must spend a large portion of their day in a classroom. Unlike the postal patron, intercommunication is an important reason for students' presence in school. The *Tinker* Court recognized the importance of student speech—a doctrine that remains good law today:

The principle use to which the schools are dedicated is to accommodate students during

doctrine in the public school context and posed possible solutions.[355] One commentator, in proposing the designation of public schools as "quasi-public" forums,[356] maintains that a "public high school can, in theory, create a neutral student forum in which content-based restrictions on speech would be strictly limited."[357] Two conditions are proposed for creation of such a forum: it cannot be created to promote religion, and subject-matter limitations must be broad enough to include but not single out religion.[358] Others have suggested a framework that includes[359] a three-tiered First Amendment analysis which provides an intermediate tier to be used in the problem area of "situational" restraints, regulations based on "a link between a defined category of speech and its harmful effects on a specific environment."[360] The public school is included in this intermediate tier. This analysis requires "focused balancing" comprised of three key components.[361] First, the government must articulate clearly what speech is permissible. Second, the regulations must possess stated goals; and third, the relationship between

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prescribed hours for the purpose of certain types of activities. Among those activities is personal intercommunciation among the students. This is not only an inevitable part of the process of attending school; it is also an important part of the educational process.

Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 512 (1969). The school, unlike the post office, is a marketplace of ideas. Comparing students to postal patrons is analogous to comparing apples to oranges.

In its analysis, the court committed a second and perhaps more egregious error: declining to apply *Tinker* to the facts before it. Seemingly, the court ignores a primary aspect of *Hazelwood*: its bifurcated approach to student speech issues. As previously stated, in *Hazelwood* the Supreme Court held that in cases where schools are merely required to tolerate student speech, *Tinker* remains the proper standard; and in cases where a reasonable person would perceive that the school has placed its imprimatur on student speech, forum analysis was the appropriate test. *Hazelwood Sch. Dist.*, 484 U.S. at 270-71. Distribution seems to fall into the *Tinker* category. Seemingly, the court answered the question when it stated that even a junior high school student would not infer school sponsorship on the distribution of religious leaflets by students in the hallways. *Hedges*, 1992 U.S. Dist. LEXIS 14716 at *61-62. Nevertheless, the court simply ignored this aspect of *Hazelwood* in choosing to apply forum analysis and thus erred in presuming *Tinker* was irrelevant.

355. *See* Farber & Nowak, *supra* note 166, at 1222-24; Gail Paulus Sorenson, *The 'Public Forum Doctrine' and its Application in School and College Cases*, 20 J.L. & EDUC. 445 (1991); Strossen, *supra* note 354, at 166; Brian S. Black, Note, *The Public School: Beyond the Fringes of Public Forum Analysis?* 36 VILL. L. REV. 831 (1991).

356. Strossen, *supra* note 354, at 166.

357. *Id.*

358. *Id.* at 170-71.

359. Farber & Nowak, *supra* note 166, at 1239-45. One student commentator, citing different reasons, also advocates that the public forum doctrine should be inapplicable to the school setting. *See* Black, *supra* note 355, at 865-66 (suggesting that the public forum analysis is inappropriate because it fails to allow school officials to engage in viewpoint discrimination). This is problematic because it fails to recognize the school as a marketplace of ideas. *See infra* notes 383-405 and accompanying text.

360. Farber & Nowak, *supra* note 166, at 1240.

361. *Id.*

the goals and the affected category of speech must be analyzed.[362] The analysis requires that the regulation remain consistent with First Amendment values. For example, it must be viewpoint neutral.[363] Finally, the proposed analysis mandates that the governmental interest must outweigh the impact upon speech.[364] Both of these proposals are problematic. The first remains couched in forum terminology and permits easy rationalization of restrictions on student expression.[365] The second proposal is subjective and permits governmental and judicial values to interfere with what should, and could, be an objective analysis.[366]

Analytical frameworks for student speech in the public schools requiring balancing can be unsatisfactory for the "metaphor of balancing refers to theories of constitutional interpretation that are based on the identification, valuation, and comparison of competing interests."[367] Some commentators maintain that bright line rules are often the superior jurisprudential tool.[368] The bright line rule, contrasted with balancing, precludes the weighing of interests on a case-by-case basis because the court adopts a general principle that is applicable in all situations regardless of the specific fact patterns.[369]

A comparison of *Tinker* and *Hazelwood* highlights the differences between these two analyses. Forum analysis, as performed in *Hazelwood*, allows courts to consider the totality of the circumstances in balancing student speech rights against purported state interests. First, the court examines the First Amendment interest at stake—student expression.[370] Second, the court evaluates the state's purported interest.[371] Finally, the

362. *Id.* at 1243.

363. *Id.*

364. *Id.*

365. *See* International Soc'y for Krishna Consciousness, Inc. v. Lee, 112 S. Ct. 2711, 2716 (1992) (Kennedy, J., concurring) (criticizing the new version of the forum analysis because "[i]t leaves the government with almost unlimited authority to restrict speech on its property by doing nothing more than articulating a non-speech-related purpose for the area . . . .").

366. Some commentators maintain that "judges inevitably must apply their own values." Farber & Nowak, *supra* note 166, at 1244. In addition, the commentators concede that such a test is not value free, but argue that it best furthers First Amendment values. *Id.* at 1244-45.

367. T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 945 (1987). A judicial decision using balancing "analyzes a constitutional question by identifying interests implicated by the case and reaches a decision or constructs a rule of constitutional law by explicitly or implicitly assigning values to the identified interests." *Id.*

368. *Id.*; Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1176 (1989).

369. *See* Scalia, *supra* note 368, at 1179-80.

370. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266-67 (1988).

371. *Id.* at 270-73.

court determines which interest outweighs the other.[372] Thus, under *Hazelwood* courts are required to engage in *ad hoc* balancing. In different cases with different facts or different courts, opposite conclusions could be reached.[373]

The two-part evidentiary inquiry of *Tinker* eliminates easy rationalization of regulations on student speech and its bright line rule is desirable for several reasons.[374] It provides greater predictability:[375] "Rudimentary justice requires that those subject to the law must have the means of knowing what it prescribes."[376] With this test students are better able to predict the limits on their speech. For example, as a result of *Tinker* students should know that standing up in the middle of the class and shouting that school authorities are wrong is impermissible because it is disruptive. They also should be able to predict that distributing leaflets is permissible as long as it is done in a peaceful, nondisruptive manner.

One commentator argues that *Tinker* is insufficient because it fails to provide deference for school regulations on speech, since only school officials can determine when speech interferes with learning.[377] However, school officials are not always impartial, particularly with respect to the need for order and to inculcate students with a particular set of values.[378] Bright line rules help to avoid such bias with respect to student speech.[379]

More importantly, the objective nature of the *Tinker* standard better protects the interests underlying the First Amendment. In *West Virginia State Board of Education v. Barnette*,[380] the Court originally recognized the right of students to express their views, regardless of content, in the public school setting. The *Tinker* Court affirmed this principle: "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[381] Because of the promotion of non-discretionary analysis, the *Tinker* standard more effectively protects the constitutional rights of students than forum

372. *Id.* at 274-76.
373. *See* Scalia, *supra* note 368, at 1179-80.
374. *See generally* Aleinikoff, *supra* note 367, at 945.
375. *See* Scalia, *supra* note 368, at 1179, 1182.
376. *Id.* at 1179.
377. David A. Diamond, *The First Amendment and Public Schools: The Case Against Judicial Intervention*, 59 TEX. L. REV. 477, 482-88 (1981).
378. *See* WHITEHEAD, *supra* note 244, at 15-24.
379. *See* Scalia, *supra* note 368, at 1180, 1182.
380. 319 U.S. 624 (1943).
381. Tinker v. Des Moines Indep. Community Sch. Dist. 393 U.S. 503, 506 (1969).

analysis.[382]

Moreover, one of the interests the First Amendment is the promotion of truth through the full discourse of ideas. As Justice Holmes stated in his well-known dissent in *Abrams v. United States*:[383]

> [T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which [society's] wishes can safely be carried out.[384]

It cannot be doubted that the best means of protecting the marketplace of ideas is through an objective analysis.

The expression of ideas is important to the development of society, and mere expression of self may be important to the development of the speaker.[385] The First Amendment preserves access to useful information and ideas for "pursuit of a better understanding of reality" by society and the individuals within it,[386] and "enables individuals to formulate and maintain their own political, moral, or religious understandings of reality, free from any right or claim of others to dominate that understanding or of government to control it."[387] As such, the First Amendment "necessarily grants certain privileges and immunities to individuals while imposing correlative limitations and disabilities on government."[388]

Yet, in the school setting, "the state not only tends to be the sole speaker, but [it also] determines the content of discourse as well as ensuring that the audience is captive."[389] All states in the United States have some form of compulsory attendance laws, some with specified exemptions for private, religious, and home schools.[390] Thus, public school students are a captive audience, but one that is often treated much differently than other audiences subject to state regulation of their expression.[391] Although excusal and release time provisions provide some rights in this respect, students will inevitably be exposed to ideas that

382. *See generally* Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1 (1989).

383. 250 U.S. 616 (1919).

384. *Id.* at 630 (Holmes, J., dissenting).

385. *See, e.g.*, MARTIN H. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS 11 (1984); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 4-5.

386. Robert M. Gordon, *Freedom of Expression and Values Inculcation in the Public School Curriculum*, 13 J.L. & EDUC. 523, 534 (1984).

387. *Id.*

388. *Id.*

389. *Id.* at 535.

390. *See generally* JOHN WHITEHEAD & ALEXIS I. CROW, HOME EDUCATION: RIGHTS AND REASONS (1993).

391. *See* Lehman v. Shaker Heights, 418 U.S. 298 (1974); Public Utilities Comm'n v. Pollak, 343 U.S. 451, 467-69 (1952) (Douglas, J., dissenting).

conflict with their religious and other beliefs.[392] In addition, the public school system has assumed the responsibility of inculcating students with "values,"[393] even though "the present cultural diversity militates against inculcation of values by public schools."[394] The role of inculcator often precludes a role for schools as "the cultivator of independent, free thinking citizens."[395] Instead of promoting free marketplace of ideas, school authorities often elevate those values and ideas that are consistent with the objectives of the school— a practice at odds with the purposes underlying the First Amendment.

The Supreme Court has recognized that school officials have some authority to "establish and apply their curriculum in such a way as to transmit community values, and that there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral, or political."[396] However, there are limitations on this authority.[397] The Court also has held that the First Amendment "imposes a limitation on the state's power to use its operation of public schools to produce citizens with certain beliefs"[398] and has recognized that the marketplace of ideas theory is applicable to public schools.[399]

For the marketplace of ideas to remain viable in the public schools, students must be permitted to express themselves and to hear the ideas of their classmates. Rather than discouraging student dialogue, schools and courts should promote student speech even if it results in the expression of ideas that school authorities disapprove of or disagree.

The *Tinker* Court, following *Barnette*, recognized the importance of student speech:

> The principle use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. Among those activities is personal intercommunication

392. *See* WHITEHEAD, *supra* note 244, at 153-70.
393. *Id.* at 19-21.
394. *Id.* at 19-20.
395. *See* Senhauser, *supra* note 251, at 978.
396. Board of Educ. v. Pico, 457 U.S. 853, 864 (1982) (plurality opinion) (citing brief for petitioners).
397. *See* Buss, *supra* note 257, at 534-37.
398. *Id.* at 536 (citing *Pico*, 457 U.S. at 871; Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 511 (1969); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925); Meyer v. Nebraska, 262 U.S. 390, 401 (1923)).
399. Healy v. James, 408 U.S. 169, 180-81 (1972); *Tinker*, 393 U.S. at 511-13; Epperson v. Arkansas, 393 U.S. 97, 104-05 (1968); Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967); Shelton v. Tucker, 364 U.S. 479, 487 (1960); *see* Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 NW. U. L. REV. 1, 49 n.233 (1986) (citing *Pico*, 457 U.S. at 864-71).

> among the students. This is not only an inevitable part of the process of attending school; it is also an important part of the educational process.[400]

Subsequent courts also have recognized the importance of student expression.[401]

Using the *Tinker* analysis is the least intrusive and restrictive way "to protect public school students from the effects of government's domination of the system of discourse in which they find themselves."[402] Under the forum analysis, even if a school opens its facilities for expressive purposes, the school may close the forum with discretion that is "inconsistent with the Court's repeated recognition that schools are especially the marketplace of ideas."[403] By limiting the state's regulatory power to two specific situations, the *Tinker* Court limits infringement by school officials on students' rights to receive information other than that which the school approves or promulgates.

Some may argue that student discussions of certain subjects, especially religion,[404] should be uniquely constrained.[405] This argument is flawed for at least two reasons.

First, as discussed in part I, due to changes in the nature and relationship of the contemporary church and state, an Establishment Clause analysis is not always necessary. The traditional church-state theory of jurisprudence assumes that the Establishment Clause protects a government with limited powers from the *de facto* established church of Protestant Christianity. However, the modern model is a wall separating a pervasive and powerful government and numerous strands of individual believers.

This is particularly true in the school context. Students who wish to engage in religious speech often stand alone in attempting to defend their free speech rights against the superior power of school authorities.

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400. *Tinker*, 393 U.S. at 512 (footnote omitted).

401. *See, e.g.*, Slotterback v. Interboro Sch. Dist., 766 F. Supp. 280, 293 (E.D. Pa. 1991) (holding "[a] public secondary school environment is not fully 'educational' where students' personal intercommunication is restricted to particular issues. Such restrictions stunt the growth of budding citizens and budding minds . . . .").

402. Gordon, *supra* note 386, at 535.

403. Laycock, *supra* note 399, at 49. For example, in Lundberg v. West Monona Community School District, 731 F. Supp. 331 (N.D. Iowa 1989), the court held that while the school could not have opened the graduation ceremony for expressive purposes, it clearly was within the school's power to reasonably restrict the content of speeches given at the ceremony. *Id.* at 337. Such reasoning grants entirely too much deference to school officials who remain free to close the speech market.

404. *See generally* Board of Educ. v. Mergens, 496 U.S. 226 (1990).

405. *See* John W. Whitehead, *Avoiding Religious Apartheid: Affording Equal Treatment for Student-Initiated Religious Expression in Public Schools*, 16 PEPP. L. REV. 229, 230 (1989) (containing an analysis supporting free religious expression in public schools).

School authorities that restrict student speech in deference to purported Establishment Clause concerns pose a serious threat to the values underlying the entire First Amendment. Such school authorities subordinate free speech interests to Establishment Clause interests.[406] Excluding religion alone from student expression in the public schools represents hostility toward religion.[407] In fact, such content-based prohibitions "prefer[s] those who believe in no religion over those who believe"[408] and "[t]he Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals."[409] Suppression of religious speech undermines the true purpose of the Establishment Clause and minimizes the cumulative social and individual benefit of free speech.

Second, even under the traditional Establishment Clause framework, student religious speech simply does not threaten the concerns of the Establishment Clause: the Establishment Clause prohibits the government from endorsing religion. The Supreme Court has noted that "there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."[410] For example, students who distribute religious literature or talk to their classmates about God are private speakers; such religious expression is neither supported nor endorsed by any government.

Two recent decisions have focused on student free speech interests rather than Establishment Clause concerns and exemplify this article's proposed analysis for student speech. In *Slotterback v. Interboro School District*[411] school prohibitions on student distribution of religious literature during school hours was challenged.[412] Although the student distributed literature in the classroom only on one or two occasions,[413] some teachers testified that the student's distribution of leaflets disrupted the activities of the school, that the pamphlet litter exceeded that of other students, and that students read the tracts in class on two occasions.[414] Another teacher observed that the distribution of the leaflets often

406. *Id.* at 237.
407. *Mergens*, 496 U.S. at 248.
408. Whitehead, *supra* note 405, at 237.
409. McDaniel v. Paty, 435 U.S. 618, 641 (1978) (Brennan, J., concurring).
410. *Mergens*, 496 U.S. at 250.
411. 766 F. Supp. 280 (E.D. Pa. 1991).
412. *Id.* at 284-85.
413. *Id.* The student's co-plaintiff also testified that he placed tracts on bathroom sinks and toilets, as well as at a bus stop. *Id.* at 284.
414. *Id.*

blocked the hallways and such obstacles caused one student to be late one day.[415] A fourth teacher stated that when she tried to break up one of the blockages, a student was belligerent and used obscenities.[416] This teacher also testified that she confiscated the tracts when some were dropped and when some were distributed during class free time.[417]

After the incident, the teacher took the student to the principal's office where the principal ordered that he stop distributing the literature or be suspended.[418] The student, however, continued his activity. After discussing the problem with an attorney, the principal proposed a compromise policy which limited the distribution to only two more times during the school year at exit doors and after school hours.[419] The student would be permitted to select the distribution dates, but had to notify the principal in advance.[420] The student filed suit challenging the restrictions.

During the period before the case came to trial, the school district developed an official policy to govern the distribution of religious literature.[421] The policy required students seeking to distribute leaflets to obtain the principal's prior approval, which would be granted unless the material fell into one of seven impermissible categories.[422] Materials promoting a *particular* religious or political belief were among the prohibited categories.[423]

The court first noted that the distribution of religious literature is protected under the First Amendment.[424] Turning to the heart of its analysis, the court observed that "[c]ourts and commentators are divided . . . over whether judicial 'forum analysis' should apply to regulations

415. *Id.*

416. *Id.* at 284-85.

417. *Id.* at 284.

418. *Id.* at 285.

419. *Id.*

420. *Id.*

421. *Id.*

422. *Id.* The policy also stated that upon approval, the students must: (1) inform the principal of the exact dates for distribution; (2) distribute materials at school exit doors in a peaceful manner without littering; and (3) if the principal finds that the process disturbs the school's operation, the principal can terminate distribution by written notice. *Id.*

423. *Id.* The school district also prohibited the distribution of materials promoting hostility or criminal behavior, as well as materials infringing on the rights of other students or interfering with the school's operation. *Id.*

424. *Id.* at 288 (citing United States v. Grace, 461 U.S. 171, 176 (1983); Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 647 (1981); Martin v. City of Struthers, 319 U.S. 141, 143 (1943); Murdock v. Pennsylvania, 319 U.S. 105, 111-12 (1943)).

limiting students' personal, protected speech that occurs on school property during school hours."[425] The court compared *Tinker* and *Hazelwood* and concluded that the situation before it did not fall within the purview of *Hazelwood*.[426] The court reasoned that "[b]ecause *Tinker* merely involved students' personal expression during school hours in a place where the students were entitled to be, *Tinker* and factually similar cases have nothing to do with a school's status as a public forum."[427]

In another case applying the *Tinker* rationale, *Rivera v. East Otero School District R-1*,[428] the court reached the same conclusion. In a challenge to a policy banning the distribution of religious literature, the court rejected the school's argument that the case should be decided under the forum doctrine.[429] The court found that *Tinker* was the controlling precedent:

> The holding in *Tinker* did not depend upon a finding that the school was a public forum. The Court did say that '[w]hen [a student] is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions' .... Thus, whether or not a school campus is available as a public forum to others, it is clear that the students, who of course are required to be in school, have the protection of the First Amendment while they are lawfully in attendance.[430]

It was also argued that *Tinker* was irrelevant because the forms of expressive conduct were different, but the Court rejected it after concluding that wearing armbands and writing were both forms of pure speech.[431] In *Rivera*, unlike *Hazelwood*, the distribution of religious literature by a student did not involve a school-sponsored or curriculum-related activity.[432] The court concluded that the school district may not place a categorical ban on distributing religious literature and may only proscribe such activity if school officials demonstrate that the conduct materially disrupted the educational process.[433]

In deciding whether to use *Tinker* or the forum analysis, the *Hazelwood* Court distinguished sponsorship from mere state toleration of

425. *Id.*
426. *Id.* at 289-90.
427. *Id.* at 290 (footnotes omitted). Despite its conclusion to bypass a forum analysis, the court elected to engage in a public forum analysis and found that the school constituted a limited public forum. *Id.* at 290-93.
428. 721 F. Supp. 1189 (D. Colo. 1989).
429. *Id.* at 1192-93.
430. *Id.* at 1193.
431. *Id.* (citing Texas v. Johnson, 491 U.S. 397, 397-406 (1989)).
432. *Id.*
433. *Id.* at 1193-94.

speech.[434] In making its decision, however, the Court focused on the wrong question. Although Justice Brennan pointed out numerous reasons for the Court to rely on the *Tinker* rationale,[435] an additional reason exists: The forum doctrine simply does not address the proper questions at issue in cases involving student speech. The forum doctrine focuses on whether the state may deny access to an individual seeking to engage in expressive activity. As one commentator notes, "[w]hen citizens claim a right to enter government property for the particular purpose of speaking, it is relevant to ask whether other speakers have been allowed the same privilege, or whether the property is especially appropriate for speech."[436]

The public forum analysis, however, fails to deal with cases in which *access is not at issue*:[437] "When citizens are going about their business in a place they are entitled to be, they are presumptively entitled to speak."[438] Because students have a right, or are required by the state to be at school, "access is not an issue, and public forum analysis is not implicated."[439]

However, where on school premises are students required to be? Where do they have a right to be? One commentator suggests that "[r]equests to meet in school rooms before or after classes do present a question of access to public property."[440] Denial of "such requests do not suppress speech among students who would have been in the rooms anyway. Rather, they deny the use of the rooms to students who have no reason or desire to be there if they cannot hold a meeting."[441]

Drawing such a line, however, does not resolve the issue. Questions of access involving student desire to meet as extracurricular groups should be based upon whether the school has created a forum for such expressive activity. Extracurricular activities are an important part of the educational process. To deny students the ability to meet in groups could foreclose an important exchange of ideas. Thus, any restriction on student speech, group or individual, should be examined under the *Tinker* standard.

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434. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 270-73 (1988).

435. *Id.* at 277-91 (Brennan, J., dissenting); *see supra* notes 338-345 and accompanying text.

436. Laycock, *supra* note 399, at 48.

437. *See id.*; Board of Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569, 573-74 (1987) (acknowledging Laycock's theory but finding that the Court need not address the issue in the case); Texas State Teachers Ass'n v. Garland Indep. Sch. Dist., 777 F.2d 1046 (5th Cir. 1985), *aff'd mem.*, 479 U.S. 801 (1986) (implying the insider/outsider dichotemy exists).

438. Laycock, *supra* note 399, at 48; Whitehead, *supra* note 405, at 248.

439. Whitehead, *supra* note 405, at 248.

440. Laycock, *supra* note 399, at 48.

441. *Id.*

Student expression must be encouraged in the public school system. Clearly, school officials have a legitimate interest in maintaining order in the educational environment. However, *Tinker* does not ignore that interest; it allows regulation of speech if the expression causes substantial disruption of the classroom. Courts and government, however, must begin to realize and emphasize the importance of allowing students to have an active role in their education. They must shift the emphasis of public education from inculcating values to providing a market for the exchange of ideas.[442] As one commentator states: "Encouraging cognitive conflict and expressive behavior in the school not only forces students to express their own judgments or opinions, but also serves the first amendment goals of self-fulfillment, enlightenment, and preparation of children for participation in a democratic society."[443]

Although it has been questioned whether students have the "rational capacity necessary for meaningful participation in the political process and the marketplace of ideas,"[444] students cannot be expected to grow and mature if they are not given the opportunity to do so.[445] Undoubtedly, some ideas and theories may be inappropriate or beyond the grasp of students of a particular age or may infringe upon the education mission of the schools. However, *Tinker*, contrary to current criticism,[446] addresses these concerns.[447] Student speech, whether on the graduation platform, in the cafeteria, or in the hallways, must be given a status superior to school concerns except in *Tinker*'s limited circumstances.

XI. CONCLUSION

The *Weisman* Court should have engaged in a free speech analysis rather than an Establishment Clause analysis. Because of the decision's inadequacies, many schools will undoubtedly attempt to limit *Weisman*

442. Senhauser, *supra* note 251, at 978-79 (stating that a student must be involved in the educational process as well free to express individual opinions in order to accomplish growth). *Contra* Diamond, *supra* note 377, at 497-501.

443. Senhauser, *supra* note 251, at 979.

444. Bruce C. Hafen, Hazelwood School District *and the Role of First Amendment Institutions*, 1988 DUKE L.J. 685, 699; *see* Diamond, *supra* note 377, at 495 (stating that children are not fully persons under the Constitution). This proposition appears contrary to the prevailing attitude among public school officials toward sex education. It seems hypocritical to discourage full constitutional protection of student speech on the grounds of capacity when schools require students—even at the middle school level—to receive sex education. If students have the capacity to understand sexual topics, it logically follows that they have the capacity to participate in the marketplace of ideas.

445. Senhauser, *supra* note 251, at 979.

446. *See generally* Diamond, *supra* note 377.

447. 478 U.S. 675, 688-90 (1986) (Brennan, J., concurring).

and continue to offer prayers at their graduation ceremonies. Others will no doubt decide that *Weisman* permits even more censorship of religious expression on public school grounds, in general, and of student expression, in particular. In any case, courts will have many opportunities to define the parameters of speech in the public schools.

Therefore, the time has come for courts, attorneys and all others grappling with these issues to examine *all* of the constitutional interests involved: When a rabbi offers a prayer at a public school graduation ceremony or a student distributes religious leaflets at a public school, the concern is not whether the public schools will become components of a state religion, but rather, whether the right of free speech exists in the public schools regardless of content.

Graduation speakers may currently discuss virtually any topic except religious ideas without concern. Nonetheless, discouraging any speech solely because of its content serves only to destroy, ultimately, all free speech.