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Constitutional Law—Freedom of Religious Speech—When Freedom of Speech in the Classroom Conflicts with the Establishment Clause. Bishop v. Aronov, 926 F.2d 1066 (11th Cir. 1991)

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NOTES

CONSTITUTIONAL LAW—FREEDOM OF RELIGIOUS SPEECH—WHEN FREEDOM OF SPEECH IN THE CLASSROOM CONFLICTS WITH THE ESTABLISHMENT CLAUSE. *Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991).

During the academic years 1984 through 1987, Dr. Phillip A. Bishop, an assistant professor of exercise physiology at the University of Alabama, made occasional references to his own Christian religious beliefs during classroom instructional time.[1] Dr. Bishop's comments were made in the context of his understanding of the creative forces behind human physiology, and his own philosophical approach to teaching and the professional academic environment.[2] These remarks were prefaced by his statements that such religious references were his personal beliefs and should be taken to provide context to all he said and did.[3]

During the spring of 1987, Dr. Bishop organized an optional class where he lectured on "Evidences of God in Human Physiology."[4] These discussions included the proposition that humankind is a product of

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1. Bishop v. Aronov, 926 F.2d 1066, 1068 (11th Cir. 1991). Dr. Bishop was employed in the Health, Physical Education, and Recreation Department in the College of Education. He taught both graduate and undergraduate students, and he supervised research problems and theses. *Id.* The University of Alabama is a state supported institution of higher education. Bishop's references to his religious beliefs were occasional. *Id.*

2. *Id.* Bishop also made occasional religious references in response to students' questions on coping with academic stress. He did not otherwise proselytize to his classes. He never read Bible passages or engaged in prayer, nor did he hand out religious literature or hold special lectures on religious topics during instructional time. *Id.*

3. *Id.* In stating his personal belief that "God came to earth in the form of Jesus Christ," Bishop told his class: "You need to recognize as my students that this is my bias and it colors everything I say and do. If that is not your bias, that is fine." Affidavit of Phillip A. Bishop at 2, *Bishop*, 926 F.2d at 1068.

4. 926 F.2d at 1068-69. This optional meeting was held after the prescribed instructional time for Bishop's classes. *Id.*

God, not of the evolutionary process.[5] Although this optional class was held just prior to the final examination, attendance was not mandatory and had no effect on final grades.[6] Five students and one professor attended the optional class.[7]

Some students in Dr. Bishop's 1986 and 1987 classes complained to Carl Westerfield, Bishop's supervisor, about Bishop's remarks and the optional class.[8] After consulting with both the dean of the college in which Bishop taught and the university's counsel, Westerfield drafted a memorandum to Bishop regarding "Religious Activities in a Public Institution."[9] After expressly affirming Dr. Bishop's academic and religious freedoms,[10] Westerfield's memorandum instructed Bishop to refrain from "the interjection of religious beliefs and/or preferences during instructional time periods and . . . the optional classes where a 'Christian Perspective' of an academic topic is delivered."[11] The university, acting under advice from its counsel, believed that it had the right to control its curriculum content and the duty to prevent an establishment of religion.[12] Dr. Bishop complied with the instructions contained

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5. *Id.* at 1069.

6. *Id.* The defendants in the case argued that the timing of the optional class created the possibility of the appearance of a coercive effect upon Bishop's students. *Id.* In determining individual grades for his students, Bishop used a blind grading system. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* In the memorandum, Westerfield stated "[f]oremost, I want to reaffirm our commitment to your right of academic freedom and freedom of religious belief. This communication should not be construed as an attempt to interfere with or suppress your freedoms." *Id.* (quoting Record at 15, *Bishop*, 926 F.2d at 1069).

11. *Id.* (quoting Record at 15, *Bishop*, 926 F.2d at 1069).

12. Bishop v. Aronov, 732 F. Supp. 1562, 1564 (N.D. Ala. 1990). University counsel believed that Bishop's religious references during instructional periods constituted an establishment of religion under the three-part test set forth in Lemon v. Kurtzman, 403 U.S. 602 (1971). He believed that Bishop's comments "lacked a secular purpose and had the effect of benefiting one religious point of view." *Id.*

The *Lemon* test represents a recapitulation of the Supreme Court's framework for analysis in determining whether a statute, ordinance, or official governmental action violates the Establishment Clause. *See* U.S. CONST. amend. I; *Lemon*, 403 U.S. at 612. In order to "pass" the *Lemon* test, the statute or governmental action in question must 1) have a secular purpose; 2) have no primary effect or principle which either advances or inhibits religion; and 3) not foster an "excessive governmental entanglement with religion." 403 U.S. at 612-13 (citations omitted).

University counsel advised Dr. Bishop that the university, as owner of the teaching facilities, had the right to determine curriculum content. *Bishop*, 732 F. Supp. at 1564.

The university believed the optional class held by Dr. Bishop to be violative of the Establishment Clause because of its potential for a coercive effect upon the students, given its timing just prior to the final examination and determination of final grades. 926 F.2d at 1069.

in Westerfield's memorandum.[13]

Following unsuccessful attempts to have the memorandum rescinded, Bishop filed suit seeking declaratory and injunctive relief.[14] His complaint alleged violations of his free speech and free exercise rights under the United States Constitution.[15] He further claimed that the memorandum was overbroad and void for vagueness.[16] The university's answer denied any First Amendment violations and raised the Establishment Clause as an affirmative defense.[17]

The District Court for the Northern District of Alabama concluded that Westerfield's memorandum was vague and overbroad.[18] The court further ruled that, because Dr. Bishop's actions did not violate the Establishment Clause,[19] the university lacked a "sufficiently compelling [interest] to support a content-based discrimination against plaintiff's extracurricular on-campus discussions with students or his in-class statements."[20] Thus, the court held that the university violated

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13. 926 F.2d at 1069.

14. *Id.* at 1069-70. Bishop tried to have the memorandum order rescinded during the fall of 1987 and again during the spring of 1988. He was unsuccessful on both occasions. 732 F. Supp. at 1564.

15. *Bishop*, 926 F.2d at 1070. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

The Supreme Court has used the Fourteenth Amendment's Due Process Clause to incorporate all of the First Amendment in order to extend its provisions to the states. Everson v. Board of Educ., 330 U.S. 1 (1947) (establishment); Cantwell v. Connecticut, 310 U.S. 296 (1940) (free exercise); DeJonge v. Oregon, 299 U.S. 353 (1937) (assembly and petition); Gitlow v. New York, 268 U.S. 652 (1925) (speech and press). *See* RONALD D. ROTUNDA, MODERN CONSTITUTIONAL LAW 359-62 (3d ed. 1989). In this case there appeared to be no university policy proscribing teachers' classroom speech involving personal views on subjects other than religion, nor was there a prohibition against organized optional class meetings which were nonreligious in nature. 926 F.2d at 1069-70.

16. 926 F.2d at 1070.

17. *Id. See supra* note 12 and accompanying text.

18. 732 F. Supp. at 1566. The district court found that Westerfield's restrictive memorandum limited all expression of personal religious views. The university restriction on Bishop's classroom speech "reach[ed] statements not violative of the Establishment Clause and fail[ed] to provide adequate notice of the proscribed speech." *Id.*

19. *Id.* at 1567. The district court applied the *Lemon* test. 403 U.S. at 612-13. *See supra* note 12 and accompanying text. The court held that Bishop's conduct had a secular purpose, did not have the primary effect of either advancing or inhibiting religion, and did not foster excessive government entanglement with religion. *Id.*

20. 732 F. Supp. at 1567. The court, relying on Widmar v. Vincent, 454 U.S. 263 (1981), applied a "strict scrutiny" standard of review. *Id.* at 1565. Under such a standard, for the university to place a content-based restriction on Bishop's speech, it must first " 'show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that

Dr. Bishop's free speech rights by its enforcement of the restrictive memorandum.[21]

The Court of Appeals for the Eleventh Circuit reversed[22] concluding that Dr. Bishop's classroom was not an open forum and therefore the university's restriction of his speech need only meet a reasonably related standard, rather than a strict scrutiny standard of review.[23] The court further concluded that the university's restrictions were reasonably related to its legitimate authority to control the content of the courses taught by Dr. Bishop.[24] The court also held that the memorandum did not violate the free exercise rights of Dr. Bishop.[25] Additionally, the court found it unnecessary to decide whether Dr. Bishop's conduct was a violation of the Establishment Clause,[26] although it did find that the university's proscription of Dr. Bishop's religious interjections into his curriculum did not, in itself, amount to an establishment of religion.[27] *Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991).

The First Amendment prohibits the government from enacting restrictions upon citizens' rights to free speech and free exercise of religion.[28] It further prohibits the government from establishing a religion.[29] The First Amendment rights of public school teachers, even as state employees, are no exception to these general constitutional rules.[30] Similarly, states may not enforce policies and practices which amount to an establishment of religion in public schools.[31]

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end.' " *Id.* at 1566 (quoting Widmar v. Vincent, 454 U.S. 263, 270 (1981)).

21. *Bishop*, 732 F. Supp. at 1568.

22. 926 F.2d at 1068.

23. *Id.* at 1071. The circuit court found that the university classroom was not a public forum, and therefore, did not merit a "strict scrutiny" standard of review for content-based restrictions on speech. *Id. See infra* notes 78-92 and accompanying text.

24. 926 F.2d at 1074-77.

25. *Id.* at 1077.

26. *Id.*

27. *Id.* at 1077-78. The court applied the *Lemon* test. 403 U.S. at 612-13. *See supra* note 12 and accompanying text. The court held that the university's restriction on Bishop's religious speech did not amount to an establishment by excluding only Christian viewpoints. *Id.*

28. U.S. CONST. amend. I. *See supra* note 15.

29. U.S. CONST. amend. I. *See supra* note 15. This prohibition also applies to actions taken by state government officials. *See* Everson v. Board of Educ., 330 U.S. 1, 15 (1940).

30. *See, e.g.*, Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969) (teachers' First Amendment rights do not disappear once they enter the campus); Pickering v. Board of Educ., 391 U.S. 563 (1968) (teachers' rights to publicly criticize school board on matters of public importance); Shelton v. Tucker, 364 U.S. 479 (1960) (teachers' associational rights).

31. *See, e.g.*, Edwards v. Aguillard, 482 U.S. 578 (1987) (state may not require the teaching of "creation science" in its curriculum); Stone v. Graham, 449 U.S. 39 (1980) (per curiam) (public schools may not post copies of the Ten Commandments on the walls of classrooms); Ep-

The unique setting, structure, and role of public schools can create an inherent tension of constitutional proportions.[32] Educators have the latitude to determine curriculum requirements and content,[33] to control conduct,[34] and to instill values.[35] On the other hand, students and teachers have constitutional rights which cannot be limited by school officials.[36] Balancing these competing interests has been a frequent task of both the Supreme Court and the lower courts.[37]

Despite volumes of litigation in this general area, the Supreme Court has yet to squarely address the extent to which a public school teacher's right to freedom of expression in the classroom supersedes the right of school officials to determine course and curriculum content.[38] In the absence of any such precedent, some federal courts have analogized teachers' classroom speech[39] rights to Supreme Court decisions

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person v. Arkansas, 393 U.S. 97 (1968) (state may not prohibit the teaching of the theory of evolution when such prohibition is based on religious grounds); School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963) (public schools may not require Bible readings or prayers).

32. Betsy Levin, *Educating Youth for Citizenship: The Conflict Between Authority and Individual Rights in the Public School*, 95 YALE L.J. 1647, 1647-51 (1986). *See* Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988).

33. *E.g.*, *Epperson*, 393 U.S. at 107.

34. *E.g.*, *Tinker*, 393 U.S. at 507.

35. *E.g.*, Ambach v. Norwick, 441 U.S. 68, 77 (1979); James v. Board of Educ., 461 F.2d 566, 573 (2d Cir.), *cert. denied*, 409 U.S. 1042 (1972).

36. *E.g.*, *Tinker*, 393 U.S. at 506. Justice Fortas, writing for the Court, noted:

> 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. This has been the unmistakable holding of this Court for almost 50 years.

Id.

Some twenty-six years earlier, Justice Jackson was equally eloquent in describing *why* First Amendment values should be carefully guarded in the public school setting:

> The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.

West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943).

37. *See* Levin, *supra* note 32, at 1649-50 n.10. For a thorough discussion of the case law exploring these competing interests, as well as a suggested balancing approach, see Gregory A. Clarick, Note, *Public School Teachers and the First Amendment: Protecting the Right to Teach*, 65 N.Y.U. L. REV., 693, 693-713 (1990).

38. Levin, *supra* note 32, at 1664. *Accord* Clarick, Note, *supra* note 37, at 696.

39. In this context, a teacher's "classroom" or "in-class" speech refers to his or her methods and practices in teaching or assisting students with their course work.

regarding teachers' articulated rights outside the classroom as citizens and government employees.[40] Other federal courts have analogized teachers' classroom rights to the Supreme Court's declarations of the in-class rights of students.[41]

The leading case concerning teachers' articulated rights outside the classroom[42] is *Pickering v. Board of Education.*[43] In this decision, Justice Marshall outlined a balancing approach to resolve the conflict between the state's interest as an employer in regulating its employees' speech and the teacher's interest in protected public expression.[44] The Court concluded that when a teacher speaks out publicly against his or her employer on a matter of public concern, such speech may be restricted or punished by the school only when it would impair the school's ability to operate efficiently, or when it would impede the proper performance of the teachers' daily duties.[45]

Teachers also have protected rights of association even when such associations are contrary to the requirements of state law or the preferences of local school boards.[46] In *Shelton v. Tucker*[47] the Court struck

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40. *See, e.g.*, Nicholson v. Board of Educ., 682 F.2d 858 (9th Cir. 1982); Pred v. Board of Pub. Instruction, 415 F.2d 851 (5th Cir. 1969). *See also* Clarick, Note, *supra* note 37, at 699-704.

41. *See, e.g.*, Zykan v. Warsaw Community School Corp., 631 F.2d 1300 (7th Cir. 1980); James v. Board of Educ., 461 F.2d 566 (2d Cir.), *cert. denied*, 409 U.S. 1042 (1972). *See also* Clarick, Note, *supra* note 37, at 704-08.

42. *See* Stephen R. Goldstein, *The Asserted Constitutional Right of Public School Teachers to Determine What They Teach*, 124 U. PA. L. REV. 1293, 1303-04 (1976).

43. 391 U.S. 563 (1968). In *Pickering* a teacher was dismissed by his school board for writing a letter to the editor of the local newspaper. His letter was critical of school officials' handling of previously proposed school revenue elections. It appeared in the paper during the campaign for a new school tax. In his letter, the teacher also attacked the school board's funding allocation between the school's athletic department and its academic programs. *Id.* at 564-67.

44. *Id.* at 568-73. The Court stated that teachers were not required to relinquish their First Amendment rights as citizens simply by virtue of their status as public employees. *Id.* at 568.

45. *Id.* at 572-73. The Court further held that a school could restrict or punish a teacher's public, critical comments on matters of public concern if school officials could show the statement(s) to have been made recklessly or with knowledge of its falsity. *Id.* at 573-74. *See* New York Times v. Sullivan, 376 U.S. 254 (1964) (for a public official to recover for allegedly defamatory statements relating to his official conduct, "actual malice" must be shown).

46. *See, e.g.*, Shelton v. Tucker, 364 U.S. 479 (1960); Wieman v. Updegraff, 344 U.S. 183 (1952) (loyalty oath prohibited). In *Shelton* a teacher's contract was not renewed because he failed to file an affidavit in compliance with Arkansas law which required disclosure of all organizations to which he belonged and had belonged for the previous five years. He was a member of the NAACP. In overturning the statute, Justice Stewart noted that "to compel a teacher to disclose his every associational tie is to impair that teacher's right to free association, a right closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society." 364 U.S. at 485-86 (citations omitted).

a balance between the state's interest and the rights of its teachers as citizens, holding that the state's right to determine the competence and fitness of its teachers did not outweigh teachers' rights of freedom of association.[48]

In *Keyishian v. Board of Regents*[49] the Court found that a New York statute which required teachers to certify that they were not Communists[50] was unconstitutional.[51] Writing for the majority, Justice Brennan quoted *Shelton* extensively and noted the nation's commitment to preserving "academic freedom."[52] The Court underscored the value of First Amendment freedoms on campus by stating that "[t]he classroom is peculiarly the 'marketplace of ideas.' "[53]

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47. 364 U.S. 479 (1960). *See supra* note 46 and accompanying text.

48. 364 U.S. at 490.

49. 385 U.S. 589 (1967).

50. *Id.* at 592. The State University of New York teachers who were involved refused to sign certificates which stated that they were not members of the Communist Party and that, if they ever had been Communists, they had communicated that fact to the university president.

51. *Id.* at 604, 609-10.

52. *Id.* at 603. *Keyishian* was a 5-to-4 decision. Justice Clark wrote the dissenting opinion in which Justices Harlan, Stewart, and White joined. *Id.* at 620.

Justice Brennan noted at one point that "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Id.* at 603 (quoting *Shelton*, 364 U.S. at 487). *But see* Goldstein, *supra* note 42, at 1335-47.

In his article, Professor Goldstein concludes that no independent constitutional right to academic freedom exists, despite the pronouncements in *Keyishian*. He further concludes that neither the professionalism, nor freedom of expression, nor the "marketplace of ideas" constructs of education provide an adequate base for a teacher's constitutional right to teach contrary to the preferences of his or her superiors. Goldstein, *supra* note 42, at 1335-57.

The basis for the doctrine of "academic freedom" is found in the nineteenth century German concept of the university: *lehrfreiheit* and *lernfreiheit*, or freedom of teaching and learning. Goldstein, *supra* note 42, at 1299. *See generally* Stephen A. Goldstein, *Academic Freedom: Its Meaning and Underlying Premises As Seen Through the American Experience*, 11 ISR. L. REV. 52 (1976). For a differing opinion as to the degree of constitutional protection which should be afforded "academic freedom," see William Van Alstyne, *The Constitutional Rights of Teachers and Professors*, 1970 DUKE L.J. 841, 869-70.

53. 385 U.S. at 603 (citation omitted). "The essentiality of freedom in the community of American universities is almost self-evident." *Id.* (quoting Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) (plurality opinion)). *See also* Goldstein, *supra* note 42, at 1297, 1350-55.

Professor Goldstein asserts that there are two models of American public education: a marketplace of ideas model and a value inculcation model. The marketplace of ideas model is more closely aligned with the German notion of freedom of teaching and learning. It is analytic in nature in that both student and teacher are active participants in the search for truth. New wisdom is sought. This pedagogical model more closely fits our theoretical paradigm of college and postgraduate studies. Goldstein, *supra* note 42, at 1297, 1350-55.

In contrast, the value inculcation model is prescriptive by design. It proceeds on the notion that the teacher's role is to pass along accepted truths and information to absorbent, theoretically passive students. New wisdom is not sought. This pedagogical approach is the accepted view

One year after the *Keyishian* decision the Court faced the underlying issue of academic freedom[54] in *Epperson v. Arkansas*.[55] While twice citing to *Keyishian*[56] and commenting on "arbitrary" restrictions upon the freedom of teachers to teach and students to learn,[57] the Court did not apply a balancing approach as it did in *Pickering*.[58] Instead, the Court decided the case on the basis of the Establishment Clause.[59] On varying grounds and to varying degrees, some lower fed-

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among both educators and the courts when analyzing the mission of primary, intermediate, and secondary education. *Id.*

Despite its apparent application to the marketplace of ideas or analytic model, "academic freedom," as an individual teacher's right superseding the authority of states to determine curriculum and content, is not mandated by either the model's theoretical basis or the Constitution. *Id.* at 1350-55.

It is the inherent philosophical contrast between the value inculcation or prescriptive model and the marketplace of ideas or analytic model which provides the basis for much of the constitutional litigation arising out of students' and teachers' asserted First Amendment rights in the classroom. These divergent approaches to educational theory also help explain the lack of clear direction from the Court in defining a precise and consistent balance between educators' interests and teachers' pedagogical choices in class. *See generally* Mark G. Yudof, *When Governments Speak: Toward a Theory of Government Expression and the First Amendment*, 57 TEX. L. REV. 863 (1979); Goldstein, *supra* note 42; Goldstein, *supra* note 52.

54. *See supra* notes 52-53 and accompanying text.

55. 393 U.S. 97 (1968). Susan Epperson, a biology teacher in the Little Rock School District, was faced with the dilemma of violating a state criminal statute by teaching materials dealing with the theory of evolution as contained in her prescribed textbook. Her alternative was to ignore the material in the prescribed text, thereby obeying the Arkansas statute but necessarily disobeying the teaching instructions given her in the prescribed materials. She sought a declaration that the state statute was void. She also sought to enjoin the school district from dismissing her for violation of the statute by the teaching of her prescribed text. She was uncertain whether the statute proscribed her from "teaching" the material, "explaining" the theory of evolution, or merely "mentioning" it. The Arkansas statute, which criminalized the teaching of the theory of evolution, was an adaptation of a Tennessee law from which arose the famous *Scopes* trial of 1927. Epperson v. Arkansas, 393 U.S. 97, 98-103. *See* Scopes v. State, 289 S.W. 363 (Tenn. 1927).

56. The Court stated that "[i]t is much too late to argue that the state may impose upon the teachers in its schools any conditions that it chooses, however, restrictive they may be to constitutional guarantees." 393 U.S. at 107 (citing *Keyishian*, 385 U.S. at 605-06). "[T]he First Amendment 'does not tolerate laws that cast a pall of orthodoxy over the classroom.' " 393 U.S. at 105 (quoting *Keyishian*, 385 U.S. at 603).

57. 393 U.S. at 105 (citing Meyer v. Nebraska, 262 U.S. 390 (1923)).

58. *See supra* notes 42-45 and accompanying text.

59. 393 U.S. at 104-09. Citing the "test" of Abington School Dist. v. Schempp, 374 U.S. 203 (1963), the Court found that the Arkansas statute had the primary purpose of advancing religion. *Id. See Schempp*, 374 U.S. 203, 222 (1963).

In a dissenting opinion in Minnesota State Bd. for Community Colleges v. Knight, 465 U.S. 271 (1984), Justice Brennan suggests that *Epperson* was decided on grounds of academic freedom rather than on grounds of the Establishment Clause. *Id.* at 296-97.

In a concurring opinion in *Epperson*, Justice Black vigorously questioned the notion that

eral courts have recognized a teacher's limited discretion to select course content and methodology.[60] This discretion has been traced to the First Amendment.[61]

In searching for guidance, some lower courts have analogized teachers' in-class free speech rights to those announced by the Supreme Court in cases concerning students' expressive rights on campus.[62] In such cases, the competing interests are similar to those weighed in *Pickering*.[63] A landmark case for students' First Amendment rights in school was *Tinker v. Des Moines Independent Community School District*.[64] The Court found itself faced with school officials' desire to "prescribe and control conduct in the schools"[65] as contrasted to students' interests in a protected right of freedom of expression.[66] The Court held that school officials could only restrict student expression which would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school."[67] Moreover, such restrictions must be grounded in something more than the officials' neb-

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"academic freedom" provides a teacher the protected right to teach contrary to the directions of his or her superiors. 393 U.S. at 113-14 (Black, J., concurring).

In a separate concurring opinion, Justice Stewart implied that, while school officials should prescribe the subjects to be included in the public school curriculum, teachers should have some leeway in their pedagogical approach. *Id.* at 115-16 (Stewart, J., concurring).

60. *See, e.g.*, Keefe v. Geanakos, 418 F.2d 359 (1st Cir. 1969); Mailloux v. Kiley, 323 F. Supp. 1387 (D. Mass. 1971), *aff'd*, 448 F.2d 1242 (1st Cir. 1971) (per curiam); Parducci v. Rutland, 316 F. Supp. 352 (M.D. Ala. 1970); *but cf.* Zykan v. Warsaw Community School Corp., 631 F.2d 1300 (7th Cir. 1980) (relevance of "academic freedom" is limited at secondary school level). *See also* Levin, *supra* note 32, at 1665-66.

61. Levin, *supra* note 32, at 1665-66.

62. *See, e.g.*, Zykan v. Warsaw Community School Corp., 631 F.2d 1300, 1305-07 (7th Cir. 1980) (discussing in dicta that the First Amendment protects a teacher's general discussion and comments in the classroom); Russo v. Central School Dist. No. 1, 469 F.2d 623, 633-34 (2d Cir. 1972) (teachers have protected right of expression); James v. Board of Educ., 461 F.2d 566, 571-75 (2d Cir. 1972) (teacher's right to wear black armband to protest Vietnam war is protected by the First Amendment), *cert. denied*, 409 U.S. 1042 (1972).

63. *See supra* notes 43-45 and accompanying text.

64. 393 U.S. 503 (1969). In *Tinker* a group of students decided to express their objections to the Vietnam war and their support for a truce. They chose to manifest this expression by wearing black armbands to school on a certain day and for a period of time thereafter. The principals of the school district learned of the plan and promulgated a rule banning such a display. Students found wearing the armbands would be asked to remove them. Those who failed to comply would be suspended until they returned without the armbands. Though the students knew of the new regulation, they chose to carry out their display. Some of these students were subsequently suspended and they filed suit against the school, alleging a violation of their First Amendment rights. *Id.* at 504-05.

65. *Id.* at 507.

66. *Id.* at 506-07.

67. *Id.* at 509 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).

ulous fear that a disturbance might occur.[68] Thus, the Court held that school officials had engaged in constitutionally impermissible content-based discrimination.[69]

Nineteen years after the decision in *Tinker*, the Court re-examined student expressive activities on campus in *Hazelwood School District v. Kuhlmeier*.[70] In *Kuhlmeier* the Court substantially increased school officials' authority to restrict student speech.[71] The *Kuhlmeier* decision distinguished *Tinker* on two grounds. First, utilizing a forum analysis, the Court decided that the student speech took place in a non-public forum and any restrictions on such speech were subject to a more deferential level of review.[72] Second, the Court framed the issue not as whether a school must *tolerate* certain student speech, but whether a school must *promote* certain student speech.[73]

The balance between the competing interests of school officials and students in *Kuhlmeier* weighed more heavily in favor of the school's concern for its "basic educational mission."[74] Justice White defined this

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68. 393 U.S. at 508. Justice Fortas, writing for the Court, said:

> In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it 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.

Id. at 509.

69. *Id.* at 511. "In our system, state operated schools may not be enclaves of totalitarianism. . . . [Students] may not be confined to the expression of those sentiments that are officially approved." *Id.*

Some commentators have interpreted *Tinker* to support the proposition of the classroom as an educational public forum in which the "marketplace of ideas" or analytic model approach to education relegates school officials' regulatory authority over student speech to one of impartial time, place, and manner control. *See* Sheldon H. Nahmod, *Beyond* Tinker: *The High School as an Educational Public Forum*, 5 HARV. C.R.-C.L. L. REV. 278, 294 (1970); Goldstein, *supra* note 42, at 1351-55; *supra* notes 52-53 and accompanying text.

70. 484 U.S. 260 (1988). High school student journalists produced two articles, one dealing with teenage pregnancy, the other dealing with the impact of divorce on students. Both were disallowed for publication in the school's newspaper by the principal. *Id.* at 262-64.

71. *Id.* at 270. "[S]chool officials were entitled to regulate the contents of Spectrum in any reasonable manner." *Id. See* Clarick, Note, *supra* note 37, at 708-09.

72. 484 U.S. at 267-70. "If the facilities have instead been reserved for other intended purposes, 'communicative or otherwise,' then no public forum has been created . . . ." *Id.* at 267 (quoting Perry Educ. Ass'n. v. Perry Local Educators' Ass'n., 460 U.S. 37, 46 (1983)). *See infra* notes 77-92 and accompanying text.

73. 484 U.S. at 270-71. The issue in *Tinker*, the Court said, was whether a school should be required to tolerate certain student speech. *Id. See supra* notes 64-69 and accompanying text.

74. *Id.* at 266 (quoting Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986)). The principal stated his reasons for disallowing publication of the two stories. He feared that the article on teenage pregnancy might betray the identity of the pregnant students interviewed and that the references to sexual activity and birth control were inappropriate for the younger stu-

standard by stating that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[75] However, the Court expressly declined to decide whether the "same degree of deference" would apply to school-sponsored student expressive activities which occurred on the college or university level.[76]

In *Kuhlmeier* the Court began its analysis by determining the nature of the "forum" at issue in a school-sponsored student newspaper.[77] The standard of review, and thereby the extent to which government may restrict speech on public property, is now routinely determined by the Court applying a forum analysis as a precursor to a balancing of interests under a traditional First Amendment analytical framework.[78] The three types of forums are set forth at length by the Court in *Perry Education Association v. Perry Local Educators' Association*.[79]

The first type identified is the traditional public forum.[80] The traditional public forum provides the greatest level of protection to expression and consists of public property historically used for speech and assembly.[81] In this forum, the government may not engage in content-based speech restrictions or exclusions unless such regulation is "necessary to serve a compelling state interest and narrowly drawn to achieve that end."[82] In a traditional public forum the government may impose

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dents. He felt that the second article, concerning divorce, should not be published unless the person criticized in it had the opportunity to defend himself. 484 U.S. at 263-64.

75. 484 U.S. at 273. The opinion was a 5-to-3 decision. Writing for the majority, Justice White was joined by Chief Justice Rehnquist and Justices Stevens, O'Connor, and Scalia. Justice Brennan filed a dissenting opinion and was joined by Justices Marshall and Blackmun. *Id.* at 261.

76. *Id.* at 273-74 n.7.

77. *Id.* at 267.

78. *See* 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, 1219-25 (1984).

79. 460 U.S. 37 (1983). *Perry* was a 5-to-4 decision.

80. *Id.* at 45.

81. *Id.* Justice White, joined by Chief Justice Burger and Justices Blackmun, Rehnquist, and O'Connor wrote:

> In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the State to limit expressive activity are sharply circumscribed. At one end of the spectrum are streets and parks which "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."

Id. (quoting Hague v. CIO, 307 U.S. 496, 515 (1939)).

82. *Id.* (citing Carey v. Brown, 447 U.S. 455, 461 (1960)). This standard of review is most

content-neutral time, place, and manner restrictions which are narrowly drawn to serve a significant governmental interest but which also leave ample alternative channels of communication.[83]

The second forum identified by *Perry* is the limited public forum.[84] It is one "designated" by the state for public use as a place for expression.[85] Once a forum is so designated, the government may act to restrict expression only under the strict confines which serve to protect speech in the traditional public forum.[86] The designated public forum can be limited to only certain groups, topics, or both.[87] Those within the included groups or topics may be restricted only under a "strict scrutiny" analysis.[88] Those outside the included groups or topics may be restricted under the more deferential standard applied to nonpublic forums.[89]

The final type of forum is the nonpublic forum.[90] This public property may be reserved by the state for certain intended purposes.[91] The regulation of speech in this forum need only be reasonable, but it cannot be an effort to suppress expression based on an individual's

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often referred to as "strict scrutiny." *See* JOHN E. NOWAK, RONALD D. ROTUNDA, & J. NELSON YOUNG, CONSTITUTIONAL LAW 530-31, 783-84 (3d ed. 1986) [hereinafter NOWAK].

83. 460 U.S. at 45. *See generally* NOWAK, *supra* note 82, at 970-84.

84. 460 U.S. at 45. *See, e.g.*, Widmar v. Vincent, 454 U.S. 263 (1981) (university meeting facilities); City of Madison Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n, 429 U.S. 167 (1976) (school board meeting); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) (municipal theater).

85. 460 U.S. at 45. *See* Cornelius v. NAACP Legal Defense and Educ. Fund, 473 U.S. 788, 802-03 (1985).

86. 460 U.S. at 46 (citing *Widmar*, 454 U.S. at 269-70).

87. *Cornelius*, 473 U.S. at 802.

88. *Id.* at 806.

89. *See* Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260, 267-70 (1988); *Cornelius*, 473 U.S. at 802-11. Some commentators have argued that *Cornelius* effectively eliminates the concept of a designated public forum as an area where significant protections for speech exist. *See* Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 NW. U.L. REV. 1, 47 (1986). *See also* E. Gregory Wallace, Comment, *Beyond Neutrality: Equal Access and the Meaning of Religious Freedom*, 12 U. ARK. LITTLE ROCK L.J. 335, 360 (1989-90). A dissent in *Cornelius* agrees:

> The Court's analysis transforms the First Amendment into a mere ban on viewpoint censorship, ignores the principles underlying the public forum doctrine, flies in the face of the decisions in which this Court has identified property as a limited public forum, and empties the limited-public-forum concept of all its meaning.

473 U.S. at 815 (Blackmun, J., dissenting).

90. *Perry*, 460 U.S. at 46. These forums are nonpublic either by tradition or design. *Id.*

91. *See, e.g., Cornelius*, 473 U.S. 788 (1985) (charity drive for public employees); *Perry*, 460 U.S. 37 (1983) (school mail facilities).

viewpoint.[92]

The Court in *Perry* found a school's mail facilities to be a nonpublic forum even though the facilities were open for use by certain teacher and student groups.[93] In such a forum, school officials could restrict or exclude speech if the restrictions were reasonable in light of the purpose of the forum.[94] By contrast, the Court in *Widmar v. Vincent*[95] found that, by opening its facilities to certain student groups, the university had created a designated public forum and could only exclude or restrict speech under a strict scrutiny standard of review.[96] Thus, in *Widmar* and *Perry* the Court apparently had two designated public forums; one was held as such while the other was found to be a nonpublic forum.[97]

Applying a strict scrutiny standard in *Widmar*, the Court searched the university's restriction for the requisite narrow tailoring to achieve a compelling state interest.[98] This proposition is opposite that of *Kuhlmeier* where the standard of review was deferential and weighed more favorably toward justifying the state's interests.[99] In *Widmar* the Court suggested that avoidance of an establishment of religion by a public university may be characterized as a compelling state interest if the avoided conduct would amount to an establishment under the three-pronged "test" of *Lemon v. Kurtzman*.[100] The *Widmar* opinion

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92. 460 U.S. at 46 (citing United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 483 U.S. 114, 131 n.7 (1981)).

Nonpublic forums are those in which accommodation for expressive activities would be inconsistent with the primary function of the property. *See, e.g.*, Greer v. Spock, 424 U.S. 828 (1976) (military reservations); Adderly v. Florida, 385 U.S. 39 (1966) (jailhouses).

93. 460 U.S. at 46-49.

94. *Id.* at 50-54. Such restrictions, however, must still remain viewpoint neutral. *Id.* at 46. *See supra* notes 90-92 and accompanying text.

95. 454 U.S. 263 (1981). A registered student religious group which had previously received permission to meet in university facilities was prohibited from any further such meetings because of a university regulation which proscribed the use of its buildings or grounds for religious purposes. *Id.* at 265-67.

96. *Id.* at 267. *See supra* notes 84-89 and accompanying text.

97. *Compare Widmar*, 454 U.S. at 267-70 (restriction in forum open for use by student groups created a public forum) *with Perry*, 460 U.S. at 46-49 (school mail facilities open to certain groups was a nonpublic forum).

98. 454 U.S. at 270.

99. *Kuhlmeier*, 484 U.S. 260, 273 (1988). *See supra* notes 70-76 and accompanying text.

100. 454 U.S. at 270-71. *See Lemon*, 403 U.S. 602, 612-13 (1971); *supra* note 12 and accompanying text.

For an interesting evolution of the second prong of the *Lemon* test under the reasoning of Justice O'Connor, see Allegheny County v. ACLU, 492 U.S. 573, 623-37 (1989) (O'Connor concurring in part and concurring in the judgment) (plurality opinion). Justice O'Connor argues that

found that a carefully designed university equal access policy would not be incompatible with the elements of *Lemon*.[101] The Court explicitly declined, however, to decide the issues which would arise if a state facilitation of free exercise and free speech should directly confront the prohibitions of the Establishment Clause.[102]

The analysis becomes extremely complex when the free speech interest is that of religious speech.[103] The equal access cases have demonstrated this complexity.[104] If students and teachers have a protected right of freedom of religious speech and the state's compelling interest is avoiding an establishment of religion, the resulting constitutional conflict is of paramount significance.[105] Is the Establishment Clause to be placed in a position of permanent supremacy over the Free Speech Clause? Should free speech rights always take precedence? Should these determinations be made on a case-by-case basis with a careful weighing of the competing interests under the facts and circumstances of each case?[106] As recently as 1990, the Court has declined to resolve

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an endorsement test, rather than a coercion analysis, better achieves the real purpose of the second prong of *Lemon* and the true meaning of the Establishment Clause. *Id.*

Justice O'Connor continued this preference for an endorsement test in Board of Educ. v. Mergens, 110 S. Ct. 2356, 2370-73 (1990) (plurality opinion). The judgment in *Mergens* upheld the constitutionality of the Equal Access Act, 20 U.S.C. §§ 4071-74 (Supp. 1989). In her plurality opinion regarding her predilection for an endorsement test to determine an establishment, Justice O'Connor notes "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." 110 S. Ct. at 2372 (emphasis in original).

101. *Widmar*, 454 U.S. at 270-76. The ultimate analysis in *Widmar* did not attempt to reconcile the competing free speech and establishment issues. *See infra* note 102 and accompanying text.

102. 454 U.S. at 273 n.13.

103. *See, e.g., Widmar*, 454 U.S. at 270-75 and nn. 12-13.

104. *See, e.g.*, Bender v. Williamsport Area School Dist., 741 F.2d 538 (3d Cir. 1984) (school's duty to prevent an establishment of religion outweighs students' free speech rights); Lubbock Civil Liberties Union v. Lubbock Indep. School Dist., 669 F.2d 1038 (5th Cir. 1982), *cert. denied*, 459 U.S. 1155 (1983) (elementary school violates Establishment Clause by allowing voluntary student religious meetings either before or after class hours); Brandon v. Board of Educ., 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981) (before class voluntary student prayer meetings on high school campus are prohibited by the Establishment Clause). *See also* Board of Educ. v. Mergens, 110 S. Ct. 2356, 2370 (1990) (upholding constitutionality of Equal Access Act but expressly declining to reconcile the competing First Amendment issues of speech and establishment). *See generally* Laycock, *supra* note 89; Wallace, Comment, *supra* note 89.

105. *See, e.g., Bender*, 741 F.2d at 557. "We are faced with a constitutional conflict of the highest order." *Id. See also Widmar*, 454 U.S. at 271 (state interest in avoiding establishment on campus *may* be a compelling interest under strict scrutiny free speech analysis) (emphasis added). *See generally supra* note 12 and accompanying text.

106. *Bender*, 741 F.2d at 557.

these issues.[107]

Bishop v. Aronov[108] presented this First Amendment conflict. Dr. Bishop sought protection from university limitations on his classroom religious speech rights. The university restricted Bishop's religious speech in an effort to fulfill its duty to avoid an establishment of religion.[109] The Eleventh Circuit first determined that Bishop's classroom was not an open public forum.[110] The court relied on the reasoning in *Kuhlmeier* to conclude that the university had not opened its facilities for general use by the public or some segment thereof.[111] Rather, the university reserved its classrooms for other intended purposes, such as the teaching of university courses for credit.[112] Therefore, university officials were free to impose reasonable restrictions on the speech of all members of the school community.[113] Thus, the relevant issue for the court was whether the university's restriction of Dr. Bishop's speech was reasonable.[114]

The court next considered Bishop's facial challenge of the university memorandum on grounds that its restriction was overbroad and void for vagueness.[115] The court determined that the memorandum reached only those remarks of Dr. Bishop made in a curriculum-related context, both in the scheduled class and in the optional class.[116] Citing its duty to narrowly construe the challenged restrictions,[117] the court determined that the memorandum's restrictions were "sufficiently nar-

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107. Board of Educ. v. Mergens, 110 S. Ct. 2356, 2370 (1990). *See supra* note 104. *Mergens* upheld the Equal Access Act under a challenge to its constitutionality on Establishment Clause grounds. 110 S. Ct. at 2373. Because the case was decided on statutory grounds, the Court refused to reconcile the competing First Amendment issues. *Id.* at 2370.

108. 926 F.2d 1066 (11th Cir. 1991). Judge Gibson, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation, wrote for the court. *Id.* at 1067.

109. *Id.* at 1069.

110. *Id.* at 1071. The court specifically reversed the district court's finding that the university had created an open public forum where content-based speech restrictions must meet a "strict scrutiny" analysis in order to survive. *Bishop*, 732 F. Supp. at 1566 (citing Widmar v. Vincent, 454 U.S. 263, 270 (1981)).

111. *Bishop*, 926 F.2d at 1071.

112. *Id.*

113. *Id. Contra Bishop*, 732 F. Supp. at 1567.

114. 926 F.2d at 1071.

115. *Id.*

116. *Id.*

117. *Id.* (citing American Booksellers v. Webb, 919 F.2d 1493, 1500 (11th Cir. 1990)). "It has long been a tenet of First Amendment law that in determining a facial challenge to a statute [here the memo], if it be 'readily susceptible' to a narrowing construction that would make it constitutional, it will be upheld." *Bishop*, 926 F.2d at 1071 (quoting Virginia v. American Booksellers Ass'n, 484 U.S. 383, 397 (1988)).

row and clear to put Dr. Bishop on notice" of what was permissible and impermissible conduct.[118] The court concluded that the restrictions did not reach protected speech and the memorandum was neither overbroad nor vague.[119]

Although freedom of religion and the Establishment Clause were at issue, the analysis undertaken by the court involved an application of the framework developed to ascertain the free speech rights of public school teachers and students.[120] The court's analysis focused on the right of the university to control its curriculum content[121] by the use of reasonable restrictions over Bishop's in-class speech.[122] The dispositive consideration, therefore, was the reasonableness of the restrictions as determined by a balancing of the university's concern for its "basic educational mission"[123] against Dr. Bishop's interest in academic freedom and his articulated free speech rights.[124]

The court then analogized the *Kuhlmeier* reasoning to the facts in this case in order to evaluate the sufficiency of the university's interests in placing restrictions on Bishop's in-class speech.[125] First, the university had an obvious interest in preventing the inherent coercive effect that a professor's speech may have upon students.[126] Second, as a public employer, the university had an interest in reasonably restricting the

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118. 926 F.2d at 1071.

119. *Id.* at 1071-72.

120. *Id. See, e.g.*, Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260 (1988) (student speech in curriculum-related expressive activities may be restricted by school officials if the restrictions are reasonable); Tinker v. Des Moines Indep. Community School Dist., 393 U.S 503 (1969) (students have a protected right to nondisruptive freedom of expression in the classroom); Pickering v. Board of Educ., 391 U.S. 563 (1968) (teachers have a protected right to speak outside the classroom on issues of public importance).

121. 926 F.2d at 1076-77.

122. *Id.* at 1074. Because the court earlier determined the university's classroom to be a nonpublic forum, the university was allowed to impose reasonable content-based restrictions on the in-class speech of Dr. Bishop, restrictions it could not otherwise impose on his public speech outside the classroom. *Id.* at 1071, 1074. *See Kuhlmeier*, 484 U.S. at 266-67. *See also supra* notes 77-92 and accompanying text.

123. 926 F.2d at 1074 (quoting *Kuhlmeier*, 484 U.S. at 266). In *Kuhlmeier*, Justice White, writing for the Court, stated that "[a] school need not tolerate student speech that is inconsistent with its 'basic educational mission.'" 484 U.S. at 266-67.

124. *Bishop*, 926 F.2d at 1076. *See supra* notes 36-61 and accompanying text.

125. 926 F.2d at 1074. *Kuhlmeier* dealt with the free expression rights of students at the high school level. 484 U.S. at 262. However, the *Bishop* court reasoned that the narrow issue present in this case, "the extent to which an institution may limit in-school expressions which suggest the school's approval," allowed the use of the *Kuhlmeier* reasoning by analogy even at the university level. 926 F.2d at 1074.

126. 926 F.2d at 1074. "The University's interest is most obvious when student complaints suggest apparent coercion—even when not intended by the professor." *Id.*

speech of its employees.[127] As an institution of higher education it had an interest in determining the curricular content and the classroom speech of its teachers.[128] Balanced against these interests was the asserted academic freedom, as a derivative of freedom of speech, of Dr. Bishop.[129] The court distinguished the *Keyishian* pronouncement of "academic freedom" from the facts at hand, however, and found no further support for an otherwise independent First Amendment right to academic freedom.[130]

Balancing these interests, the court held that the university's concern about the curriculum content of its classes and the in-class conduct of its professors was sufficient to allow its reasonable restriction of Dr. Bishop's classroom speech.[131] The restrictions adopted were reasonable because they only proscribed Dr. Bishop's in-class religious references made in connection with the content of the prescribed course materials.[132]

The court further held that the university had valid interests in preventing the appearance of coercion and in controlling the content of curriculum-related optional classes. Such interests were sufficient to permit the prohibition on optional classes discussing a "Christian perspective" of an academic topic.[133] These restrictions were reasonable because they did not prevent similar meetings which were clearly separate and distinct from the curricular course requirements.[134]

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127. *Id. See Pickering,* 391 U.S. at 568 ("it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees"); Shelton v. Tucker, 364 U.S. 479, 485 (1960) ("[t]here can be no doubt of the right of a state to investigate the competence and fitness of those whom it hires to teach in its schools"). *See generally* Goldstein, *supra* note 42, at 1337.

128. 926 F.2d at 1074.

129. *Id.* at 1075. The court quoted Keyishian v. Board of Regents, 385 U.S. 589 (1967), in which Justice Brennan stated:

> Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.

Id. at 603.

130. 926 F.2d at 1075. *Keyishian* dealt with the refusal of public school teachers to sign certificates stating that they were not Communists. 385 U.S. at 592. *See supra* notes 49-51 and accompanying text. Judge Gibson refused to extrapolate a right of academic freedom in the *Keyishian* context to the *Bishop* context and said that he would not use such an analogy to forbid schools from exercising control over their own courses. 926 F.2d at 1075. *See also* Goldstein, *supra* note 42, at 1298.

131. 926 F.2d at 1076.

132. *Id.*

133. *Id.*

134. *Id.* Concluding his reasoning on the free speech issues of the case, Judge Gibson wrote:

Dr. Bishop also challenged the university's actions as a violation of his right to free exercise of religion.[135] The court found little merit to this claim and held that the university's restriction was directed at Bishop's teaching practices, not his efforts to practice his religion.[136] Thus, the court found no free exercise violation.[137]

The court's final consideration addressed Establishment Clause issues.[138] The university raised the Establishment Clause[139] as an affirmative defense to Dr. Bishop's complaint.[140] Bishop argued that the university's actions amounted to an establishment of religion because the only viewpoints proscribed were Christian viewpoints.[141] Although noting that the university should have a concern at the mere appearance of proselytizing by a faculty member,[142] the court did not reach the question of whether Bishop's actions constituted an establishment of religion.[143] Also, the court held that the university's actions were not an establishment of religion under the *Lemon* test.[144] Rather than creating

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> In short, Dr. Bishop and the University disagree about a matter of content in the courses he teaches. The University must have the final say in such a dispute. . . . We have simply concluded that the University as an employer and educator can direct Dr. Bishop to refrain from expression of religious viewpoints in the classroom and like settings.

Id. at 1076-77.

135. *Id.* at 1070. Bishop's free exercise challenge came in his amended complaint.

136. *Id.* at 1077.

137. *Id.*

138. *Id.*

139. U.S. CONST. amend. I. *See supra* note 12 and accompanying text.

140. 926 F.2d at 1070.

141. *Id.* at 1077. Bishop argued that because the university's restrictions excluded only the Christian viewpoint from being discussed in his classroom, the university's actions constituted an establishment of religious viewpoints other than Christianity. *Id.*

142. *Id.*

143. *Id.* In dicta, Judge Gibson noted the "particularly suspect" nature of Bishop's optional class in light of the creation/design content of his lecture. *Id.* (citing Edwards v. Aguillard, 482 U.S. 578 (1987) (Louisiana statute requiring the teaching of "creation science" whenever the theory of evolution is taught is a violation of the Establishment Clause because it lacks a secular purpose and it impermissibly endorses religion)). The court in *Bishop* chose, however, to dispose of the case on grounds of permissible reasonable restrictions on speech, rather than on Establishment Clause grounds. *Id.* "[W]e hold that [the] memo was reasonable and within [the university's] powers to control the content of curriculum in the classroom, regardless of the Establishment Clause." *Id.* at 1078.

144. *Id.* at 1077. The court found that the university's actions 1) had only a secular purpose; 2) neither advanced nor inhibited religion because the university sought to "maintain a neutral, secular classroom by its restrictions"; and 3) did not promote an excessive entanglement of government with religion because the university sought "only to extricate itself from any religious influence or instruction in its secular courses." *Id. See* Lemon v. Kurtzman, 403 U.S. 602, 611-12 (1971). *See also supra* note 12 and accompanying text.

an establishment of religion, the university's actions sought to avoid any entanglements with religion.[145] Furthermore, the memorandum excluded only Christian viewpoints because only those specific viewpoints were a source of student complaint and subsequent dispute between the university and Dr. Bishop.[146]

The court's analysis of the facts and issues in *Bishop* is troubling in a number of respects.[147] The first troubling element is the court's manipulation of the forum analysis. Initially, the court found that Dr. Bishop's classroom was not an open forum.[148] The court expended little discussion in deciding this critical issue. However, the short analysis undertaken virtually decided the case.

The restriction placed by the university upon Dr. Bishop's speech was a content-based prohibition. For content-based restrictions to pass constitutional muster, they must normally survive "strict scrutiny" *unless* a more deferential standard of review can be justified.[149] Thus, in recent years the Supreme Court has utilized a forum analysis to locate the relevant starting point for First Amendment free speech protection.[150] For the *Bishop* court that starting point was a reliance on the *Kuhlmeier* decision.[151]

In *Kuhlmeier* the Court dealt with a school-sponsored newspaper written and published by high school students under the direction and guidance of a teacher/advisor.[152] At issue was the propriety of student-written materials for publication in an instructional tool.[153] In *Bishop* the setting was a university classroom in which at least some of the

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145. *Bishop*, 926 F.2d at 1078.

146. *Id.* at 1077-78.

147. 926 F.2d 1066 (11th Cir. 1990).

148. *Id.* at 1071. *See supra* notes 78-92 and accompanying text.

149. The restriction must be necessary to serve a compelling state interest and narrowly drawn to achieve that end. *See supra* notes 81-89 and accompanying text. This analysis applies only to protected speech. Some forms of speech are not protected. *See, e.g.*, Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 447 (1980) (misleading commercial speech); Paris Adult Theater I v. Slaton, 413 U.S. 49 (1973) (obscenity); Brandenburg v. Ohio, 395 U.S. 444 (1969) (incitement to imminent lawlessness); New York Times v. Sullivan, 376 U.S. 254 (1964) (defamation); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (fighting words).

150. *See* Farber & Nowak, *supra* note 78, at 1221-22 n.15 (finding that the Court has used the phrase "public forum" only thirty-two times, thirty of which have been since 1970 and thirteen of which occurred between 1980 and 1984 (the date of the article's publication)).

151. *Bishop*, 926 F.2d at 1070-71.

152. 484 U.S. at 262-64. The *Kuhlmeier* court expressly declined to extend its reasoning to the college or university level. *Id.* at 273-74 n.7.

153. *Id.* at 262-64.

participants were graduate students. At issue were the "pure speech"[154] comments and the pedagogical approach of an accomplished professor.

Despite the almost irreconcilable factual differences between *Bishop* and *Kuhlmeier*, the court in *Bishop* appeared predisposed to an application of the deferential *Kuhlmeier* balancing approach.[155] In order to adopt such an approach, it had to first find justification for giving greater latitude to university officials. In order to achieve that result, the court turned to the forum doctrine.

Such an approach points out an inherent problem frequently encountered in the application of the forum doctrine: the outcome determinative nature of the forum selection. In many cases the forum analysis itself, rather than the true balancing of the real interests at stake,[156] becomes the focal point of First Amendment case opinions.[157] By manipulating the myriad twists and turns of the forum doctrine, courts are able to engage in linedrawing semantics which allow constructs designed to achieve a desired result. Thus, the selection of a particular forum label, rather than a direct assessment of competing First Amendment issues, is often dispositive of the case.

In *Bishop* a better argument can be made that the university classroom was a limited public forum as long as faculty were not prohibited from expressing their personal views in classroom discussions.[158] In the university setting, the freedom to teach, to learn, and to exchange ideas is the very essence of higher education.[159] In a limited public forum, Dr. Bishop's classroom comments would receive the highest level of constitutional protection. Yet, in its apparent desire to give university officials greater control over all classroom speech by faculty

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154. *See supra* note 1-3 and accompanying text.

155. *See supra* notes 70-77 and accompanying text.

156. *See* Farber & Nowak, *supra* note 78. The Farber & Nowak article provides a very good criticism of the use of the public forum doctrine in general. It also proposes a "focused balancing test" as an alternative in certain contexts. This test would more accurately attempt to take into account the real competing interests present in free speech cases. *Id.*

157. *See, e.g.*, Cornelius v. NAACP Legal Defense and Educ. Fund, 473 U.S. 788 (1985); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983).

158. *Bishop*, 926 F.2d at 1069.

159. If a university is a "marketplace of ideas" then its classrooms might appropriately be characterized as academic open fora. *See* Nahmod, *supra* note 69, at 294. While Professor Goldstein declines to find a constitutional *mandate* for absolute teacher academic freedom in the classroom, he does concede that the analytic pedagogical model of freedom of teaching and learning is most at home on a university campus. Goldstein, *supra* note 42, at 1342. *See also supra* notes 52-53 and accompanying text.

members,[160] the court placed Bishop's classroom in the same category with a high school newspaper. This accomplished what *Kuhlmeier* declined to do.[161] The *Bishop* court equated abstract university classroom discussion with school-sponsored expressive activities on the secondary school level. It did so by way of the forum doctrine. In so doing, the court gave great deference to the whims of reasonableness conjured up by local school officials.

A second disturbing element of *Bishop* is its apparent endorsement of viewpoint discrimination in what it found to be a nonpublic forum. Viewpoint discrimination of protected speech by public officials is never permissible, no matter the forum label.[162] Dr. Bishop always preceded his in-class religious remarks with the clear caveat that they were his personal bias, his perspective.[163] As such, some of these remarks were likely within the legitimate scope of his course of instruction.[164] There is no real evidence of any coercion by Dr. Bishop, nor does it appear he ever proselytized to his students.[165] He made it clear that his "optional class" was not mandatory,[166] and it was no doubt known by his students that he used a "blind" grading system.[167] Moreover, "undisputed affidavits" of other professors indicated that the university did not have a policy which prohibited faculty members from interjecting their personal, nonreligious views into their classroom discussions.[168] In light of these facts, the argument can be made that the university's restriction was a viewpoint discrimination against Dr. Bishop and as such was not permissible, even under the more deferential standard of review.

A third troubling aspect of *Bishop* stems from its sanction of viewpoint discrimination. The court's reasoning apparently allows faculty members to interject secular personal views into their classroom discussions. It apparently does not allow for the interjection of religious per-

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160. 926 F.2d at 1076-77.

161. *See supra* note 76 and accompanying text. "We need not now decided whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level." 484 U.S. at 273-74 n.7.

162. *See Perry*, 460 U.S. at 46 (even reasonable regulations on speech in a nonpublic forum may not be an effort to suppress expression because public officials oppose the speaker's view). *See also supra* notes 90-92 and accompanying text.

163. 926 F.2d at 1068.

164. *Id.* Dr. Bishop taught exercise physiology, a subject in which varying theories of human tolerance, design, and origin are likely to arise within the academic context. *Id.*

165. *See id.* at 1068-69.

166. *Id.* at 1069. Attendance was voluntary. Only five students and one professor attended.

167. *Id.*

168. *Id.*

sonal views, even when such comments would not rise to a violation of the Establishment Clause. Such viewpoint discrimination could be seen, in itself, as a violation of the Establishment Clause by manifesting a governmental hostility toward religious speech.

Under its analysis, the *Bishop* court appears to favor secular viewpoint speech over religious viewpoint speech. The court explicitly stated that its holding was based on a public forum free speech analysis, not on an analysis under the religion clauses.[169] However, implicit in the court's justification for allowing the restriction on Dr. Bishop's comments was its apparent concern that Dr. Bishop's religious views might offend the Establishment Clause. Such a justification virtually equates neutrality with secularism. Governmental neutrality towards religion, as required by the Establishment Clause, does not equate to a governmental enforcement of secularism.[170] In permitting only secular, nonreligious personal views to be expressed by professors in the classroom, the *Bishop* court has overstepped neutrality by fostering a governmental hostility toward religious speech. This, in itself, violates the Establishment Clause.

The final, and most disturbing, aspect of the *Bishop* decision is the court's expressed avoidance of the competing First Amendment issues present in the case. By its use of the public forum doctrine to determine a lower standard of review for the restrictions imposed upon Dr. Bishop, the court purported to resolve this case on free speech grounds alone. In so doing, the court avoided the exploration of a balancing approach to resolve the difficult issue of a direct conflict between free speech rights and Establishment Clause concerns. Suppose Dr. Bishop's speech had been found to be protected to a greater degree by a strict scrutiny standard. Further assume that the university had been able to show that Bishop's conduct amounted to an establishment of religion under the *Lemon* test,[171] thereby providing it with a compelling state interest. Under such a scenario, the court would have found itself struggling to reconcile a "constitutional conflict of the highest or-

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169. *Id.* at 1072.

170. Neutrality implies a governmental ambivalence toward religion, neither an advancement nor an inhibition of religion. Secularism implies that the government should adopt a position which is, in itself, the antithesis of any theological doctrine. *See* Michael W. McConnell, *Neutrality Under the Religion Clauses*, 81 NW. U.L. REV. 146, 161 (1986); Laycock, *supra* note 89, at 6-14; Wallace, Comment, *supra* note 89, at 365-67.

171. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). *See supra* note 12 and accompanying text.

der."[172] There is no Supreme Court precedent for resolution of this issue.[173]

Realistically, under the facts of *Bishop*,[174] it is difficult to imagine how his conduct violated the Establishment Clause. It is therefore difficult to justify a restriction on Bishop's speech simply because it was religious in nature. Under the court's reasoning, however, if the speech to be scrutinized is religious speech, it can be restricted in a limited public forum *without regard* to its actual encroachment upon the prohibitions of the Establishment Clause.

By failing to even attempt to balance the competing First Amendment issues presented in this case, the court has cast a disturbing light on the intellectual freedoms of the university classroom. If religious speech may be restricted on campus without a true analysis as to its constitutional infirmity, then the deferential standard adopted here could also apply to restrict (or require) certain political, philosophical, or scientific ideas. There is, and always should be, little tolerance for such orthodoxy in the "marketplace of ideas."

D. Grant Carwile

172. *Bender*, 741 F.2d at 557.
173. *See* Board of Educ. v. Mergens, 110 S. Ct. 2356, 2370 (1990).
174. 926 F.2d at 1067-70.